No. 90-1262-CFX
Status: GRANTED

Title: Arkansas, et al., Petitioners
v.
Oklahoma, et al.

Docketed:
February 8, 1991

Court: United States Court of Appeals
for the Tenth Circuit

Vide:
90-1266

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40 printed copies ea. pet & appd 122890 ext until 020891 by White, J.-CITED

Entry	Date	Note	Proceedings and Orders
1	Dec 27 1990	G	Application (A90-501) to extend the time to file a petition for a writ of certiorari from January 9, 1991 to February 8, 1991, submitted to Justice White.
2	Dec 28 1990		Application (A90-501) granted by Justice White extending the time to file until February 8, 1991.
3	Feb 8 1991	G	Petition for writ of certiorari filed.
4	Feb 8 1991		Appendix of petitioner filed.
5	Mar 11 1991		Brief amici curiae of Champion International Corp., et al. filed. VIDED.
6	Mar 11 1991		Brief amici curiae of Assn. of Metropolitan Sewerage Agencies, et al. filed. VIDED.
7	Mar 11 1991		Brief amici curiae of Colorado, et al. filed. VIDED.
8	Mar 11 1991		Brief amicus curiae of Montana filed. VIDED.
9	Mar 11 1991		Brief of respondents Oklahoma, et al. in opposition filed. VIDED.
10	Mar 13 1991		DISTRIBUTED. March 29, 1991
11	Mar 15 1991	X	Reply brief of petitioners Arkansas, et al. filed.
12	Apr 1 1991		Petition GRANTED. The case is consolidated with No. 90-1262, and a total of one hour is allotted for oral argument.
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14	May 3 1991		Order extending time to file brief of petitioner on the merits until May 31, 1991.
15	May 31 1991		Brief amicus curiae of Colorado Water Congress filed. VIDED.
16	May 31 1991		Brief amici curiae of Champion International Corporation, et al. filed. VIDED.
17	May 31 1991		Brief of petitioners Arkansas, et al. filed. VIDED.
18	May 31 1991		Joint appendix filed. VIDED.
19	May 31 1991		Brief amici curiae of Nevada, et al. filed. VIDED.
20	May 31 1991		Brief amici curiae of Mountain States Legal Foundation, et al. filed. VIDED.
21	May 31 1991		Brief of petitioner Environmental Protection Agency filed. VIDED.
22	May 31 1991		Brief amici curiae of Association of Metropolitan Sewerage Agencies, et al. filed. VIDED.
23	May 31 1991		Brief amicus curiae of Colorado filed. VIDED.
26	Jun 12 1991	G	Motion of the Solicitor General for divided argument filed.
25	Jun 13 1991		Order extending time to file brief of respondent on the merits until July 22, 1991.
27	Jun 24 1991		Motion of the Solicitor General for divided argument GRANTED.
28	Jul 22 1991		Brief of respondents Oklahoma, et al. filed. VIDED.
29	Jul 22 1991		Brief amici curiae of Illinois, et al. filed. VIDED.
30	Jul 22 1991		Brief amici curiae of Natural Resources Defense Council, et al. filed. VIDED.
31	Jul 22 1991		Brief amici curiae of Scenic Rivers Associaton of Oklahoma, et al. filed. VIDED.
32	Jul 22 1991		Brief amicus curiae of Cherokee Nation of Oklahoma filed. VIDED.
33	Jul 22 1991		Brief amicus curiae of Mike Synar, Member of Congress filed. VIDED.
34	Jul 22 1991		11 copies of Lodging received. VIDED.
35	Jul 22 1991		Brief amicus curiae of U.S.Senator Don Nickles filed. VIDED.
37	Jul 22 1991		Brief amicus curiae of Sierra Club filed.
36	Jul 30 1991		CIRCULATED.
38	Aug 2 1991	X	Brief of respondent OK Wildlife Federation filed. VIDED.
39	Aug 23 1991		Record filed.
		*	Received record from USCA 10 (not certified).
40	Aug 29 1991	X	Reply brief of petitioner EPA filed. VIDED.
41	Sep 4 1991	X	Reply brief of petitioners Arkansas, et al. filed. VIDED.
42	Oct 15 1991		SET FOR ARGUMENT WEDNESDAY, DECEMBER 11, 1991. (2ND CASE)
43	Dec 11 1991		ARGUED.

No. 90-1262

FILED
FEB 8 1991
OFFICE OF THE CLERK

IN THE

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OCTOBER TERM, 1990

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v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Water Act provides that all publicly and privately owned facilities intending to discharge any effluent into the nation's waters must obtain a discharge permit from the U.S. Environmental Protection Agency or from a designated agency in the source state. To obtain a permit under this National Pollutant Discharge Elimination System (NPDES), the facility (or point source) must demonstrate that the discharge will both meet the technology-based effluent limitations set by EPA and comply with the approved water quality standards of the source state.

At issue in this petition is whether the court of appeals erred by holding that the Clean Water Act imposes two further conditions on the issuance of NPDES permits. The specific questions raised by the court's decision and this petition are:

(1) Whether a facility must also comply with the water quality standards of all downstream states, regardless of their terms and severity, and furthermore, whether EPA lacks any discretion in applying those downstream standards; and

(2) Whether a pre-existing violation of water quality standards on any downstream segment, in either the source state or any downstream state, automatically precludes the issuance of new permits.

PARTIES TO THE PROCEEDINGS

The State of Arkansas, the Arkansas Department of Pollution Control & Ecology (A.D.P.C. & E.), the City of Fayetteville, Arkansas and the Beaver Water District, petitioners in this Court, were all cross-petitioners in the court of appeals.

The State of Oklahoma, the Oklahoma Scenic Rivers Commission, the Oklahoma Pollution Control Coordinating Board, and Save The Illinois River (STIR) were petitioners in the court of appeals, and the Oklahoma Wildlife Federation was an intervenor on the side of Oklahoma. These Oklahoma parties are all respondents in this Court.

The U.S. Environmental Protection Agency (EPA) was the respondent in the court of appeals and is filing a separate petition for certiorari in this Court.

All of the Arkansas parties joining this petition are governmental and public entities and have no subsidiaries, affiliates, or parent corporations. *See* Supreme Court Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the State of Arkansas, the Arkansas Department of Pollution Control & Ecology, the City of Fayetteville, Arkansas and the Beaver Water District, respectfully request that a writ of certiorari issue to review the judgment in this case of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 908 F.2d 595 and is reprinted at App. A in the Appendix to this Petition. The Initial Decision by the Administrative Law Judge (ALJ) for the Environmental Protection Agency (EPA), the Order on Petitions for Review by EPA's Chief Judicial Officer (CJO), the ALJ's Decision on Remand, and the CJO's Second Order on Petitions for Review are reprinted as App. F, App. G, App. H, and App. I, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1990. App. E. Timely petitions for rehearing and rehearing *en banc*, filed by the Arkansas parties and EPA, were denied by the court of appeals on October 11, 1990. App. B. The court of appeals nevertheless granted a stay of mandate on October 31, 1990 pending the timely filing of a petition for certiorari. App. C. On December 28, 1990, Justice White extended the time for filing this petition to and including February 8, 1991. App. D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

STATUTE INVOLVED

The statute involved is the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387.[1] The relevant portions of Sections 301, 303, 401, 402 and 510 of the CWA are set forth in App. J.

STATEMENT OF THE CASE

This petition presents two issues of fundamental importance to the allocation of regulatory authority and the implementation of water quality standards under the Clean Water Act. The first issue involves the authority of downstream states to compel facilities in upstream states to comply with downstream standards as a condition of obtaining new discharge permits. Under the Tenth Circuit's decision, downstream states have virtually unfettered discretion to set more stringent standards and give them extra-territorial effect, even to the point of blocking the issuance of new permits in upstream states.

The second issue presented involves the impact of preexisting violations on the ability of EPA and the states

[1] For the Court's convenience, citations throughout are to the sections of the CWA. Parallel citations to the U.S. Code are provided in the Table of Authorities and in App. J.

to grant new permits under the Clean Water Act. According to the Tenth Circuit, a violation of water quality standards on one segment of a waterway triggers a permit ban for all upstream segments and tributaries, both in the state of the violation and in any upstream state. Both of these issues have extraordinary implications for upstream states, for the resolution of interstate disputes over water quality, and for the ability to grant new discharge permits throughout much of the nation.

Statutory Background. Any publicly or privately owned facility that discharges into the nation's waterways must obtain a permit under the CWA's National Pollution Discharge Elimination System (NPDES). One condition for receiving an NPDES permit is that a new point source must comply with the technology-based effluent limitations established by EPA. CWA § 301(b). In addition, a point source must comply with such other limitations as are necessary to ensure compliance with "applicable" water quality standards. CWA § 301(b)(1)(C).

Although EPA establishes certain minimum federal criteria, the states are primarily responsible for promulgating the water quality standards within their own jurisdiction. These standards typically set maximum limits on the level of various pollutants in the receiving waters, and while subject to EPA approval, can vary markedly and sometimes far exceed the federal criteria. CWA §§ 304(a), 510. The responsibility for issuing NPDES permits can also be delegated to states with approved permitting programs. Otherwise, EPA acts as the permitting agency in states that do not have approved programs. CWA § 402(b).

Factual Background. The City of Fayetteville is located in the northwest corner of Arkansas, approximately thirty miles from the Oklahoma border. Like virtually all other cities, Fayetteville operates a wastewater treatment facility that collects, treats, and eventually must discharge the water used by local residents and busi-

nesses. In the early 1980's, Fayetteville decided to replace its aging treatment plant, which had caused numerous violations of Arkansas water quality standards and recurring fish kills, by constructing a new state-of-the-art treatment facility at the cost of $40,000,000.[2] After extensive studies and hearings, the Arkansas authorities concluded that a split-flow discharge of the new facility's treated effluent, between the White River and a creek that ultimately flows into the Illinois River, would best minimize any environmental impact of the new facility.[3]

The Agency Proceedings. In due course, Fayetteville applied to EPA for an NPDES discharge permit under CWA § 402 to operate this new plant and authorize the split-flow discharge.[4] EPA then determined that the Fayetteville discharge would comply with all federally-approved Arkansas water quality standards on both the White and Illinois Rivers. Furthermore, the Agency

[2] The new Fayetteville wastewater treatment plant incorporates advanced wastewater treatment utilizing biological phosphorous removal and nitrification, rapid sand filtration, post-aeration, dechlorination, and effluent storage, in addition to conventional types of treatment. There are very few wastewater treatment plants in the United States that have this level of sophistication for treating effluent to remove nutrients and other pollutants.

[3] The Arkansas authorities found that a 100% discharge into the White River would violate Arkansas' water quality standard for dissolved oxygen. In contrast, the split-flow alternative would permit compliance with the standards on both rivers, and would minimize the environmental impact by utilizing the natural assimilative capacity of both river basins to remove the very low concentration of nutrients and other materials that remain in the treated effluent. In addition, since 55% of the population that contributes waste to the new facility lives in the Illinois River Basin and the remaining 45% lives in the White River Basin, the split-flow approach has the virtue of returning effluent to the same basin that generates it.

[4] EPA had not delegated permitting authority to Arkansas when the application was filed in June 1985. Although Arkansas has since received this authority, that fact does not affect EPA's issuance of the permit in this case or the continuing importance of the issues presented here.

found that the discharge from the Fayetteville facility would have no adverse impact on the receiving waters. Oklahoma and Arkansas, however, have had a number of disputes regarding the rivers that flow between those states, and Oklahoma promptly objected to EPA's decision based on the partial discharge into tributaries of the Illinois River, which flows into Oklahoma about forty miles downstream from Fayetteville.[5]

Following a three-day evidentiary hearing in August 1987, the ALJ upheld the permit based on a finding that the Fayetteville discharge would have no "undue impact" on Oklahoma water quality. App. 105a. The ALJ's decision was upheld in part and vacated in part by EPA's CJO on June 28, 1988, who determined that the proper legal standard for interstate water disputes was whether the Fayetteville discharge would "cause an actual *detectable* violation of Oklahoma's water quality standards." App. 117a (emphasis in original). Applying this standard on remand, the ALJ found that the Fayetteville discharge would have no detectable impact on Oklahoma water quality, and therefore again approved the permit. App. 122a. The ALJ's decision to approve the permit was upheld by the CJO on December 22, 1988, App. 145a, and the Fayetteville facility began discharging under its approved permit in January 1989.

The Court Of Appeals' Decision. The Oklahoma parties then sought judicial review, and in the decision below, the Tenth Circuit reversed EPA's approval of the split-flow discharge. This decision rests on two key holdings. First, the court held that a facility could not receive an NPDES permit for a discharge into an interstate waterway or its tributary unless it complied with *all* the fed-

[5] Specifically, the challenged half of the facility's effluent is discharged into an unnamed tributary of Mud Creek, which flows two miles to the tributary's confluence with Mud Creek, which flows three miles to Clear Creek, which flows thirteen miles to the Illinois River, which then flows approximately twenty-two additional miles to the Oklahoma border.

erally-approved water quality standards of *all* downstream states. App. 43a. To this extent, the court agreed with EPA's decision and rejected Arkansas' contention that the Oklahoma standards were inapplicable. However, the court went on to reject EPA's approach for applying the downstream Oklahoma standards and also specifically rejected EPA's exception for discharges having a "non-detectable" impact. App. 45a-53a. Under the court's approach, EPA is left no discretion to apply, interpret or determine compliance with the standards of a downstream state. This construction of the CWA, in effect, gives downstream states an absolute veto over permit decisions in the source state.

The Court made its second key holding in the course of deciding against remanding the case to EPA. In particular, based on its interpretation of the statutory scheme, the court held that any pre-existing downstream violation of a relevant water quality standard should preclude granting new permits on upstream segments of that waterway or its tributaries.[6] App. 79a-80a. This ban on new permits even applies to new discharges that would have no detectable impact on downstream water quality and would not contribute in any way to the downstream violation. So long as *some* amount of the effluent would reach the downstream segment experiencing water quality violations, the discharge is banned.[7]

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[6] A "relevant" water quality standard refers to a standard that applies to the types of pollutants discharged by a particular source. Thus, the Tenth Circuit's decision imposes a ban on any new discharge of pollutants that are of the type responsible for a pre-existing violation of a downstream water quality standard.

[7] Although the court did limit this ban to dischargers whose effluent "would reach" the downstream segment experiencing a water quality violation, App. 67a, the practical significance of this limitation is unclear. EPA previously had found that the Fayetteville discharge would have no detectable effect on Oklahoma water quality, App. 78a, and even though the court did not disturb that finding, it still concluded that enough effluent from the Fayetteville facility "reached" Oklahoma waters for the ban to apply.

In applying this new rule, the Tenth Circuit did not disturb EPA's finding that the Fayetteville discharge would have no detectable effect on Oklahoma water quality. App. 78a. Under the court's view, that finding was simply irrelevant. Instead, the court undertook its own review of the record and found that pre-existing violations of Oklahoma's non-degradation standard were occurring on segments of the Illinois River in Oklahoma, and that some amount of the Fayetteville discharge, even if undetectable, would reach Oklahoma. App. 67a. Based upon these factual "findings" and the two legal holdings described above, the court concluded that no remand to the Agency was required and that EPA was compelled to deny the permit for the split-flow discharge into the Illinois River tributaries. App. 83a.

REASONS FOR GRANTING THE WRIT

The two legal issues raised by the Tenth Circuit's decision are critical to the administration of the Clean Water Act and to the resolution of interstate disputes over water quality regulation. The NPDES program now governs the permitting for virtually all public and private facilities that discharge into the nation's waterways. The ability of countless facilities to obtain those permits, and the enormous investment required of public authorities and private industry to build those plants and comply with NPDES permits, frequently depend on the delineation of authority between upstream and downstream states. Similarly, the Tenth Circuit's conclusion that either in-state *or* out-of-state violations of water quality standards preclude new discharges—on all upstream segments and tributaries—will dramatically affect the availability of new permits and the completion of pending projects throughout many regions of the country.

Not only are the two issues presented vital for all the states, but the Tenth Circuit's resolution of those issues threatens to undermine twenty years of precedent and radically alter administration of the CWA. In particular,

with respect to the *first* issue of interstate authority, the Tenth Circuit's decision conflicts with a series of this Court's decisions holding and assuming that a state can only regulate sources within its own borders. At least two other circuits and one state supreme court have also reached conclusions that are directly opposite to the Tenth Circuit's holding. In addition, the Tenth Circuit's decision would disrupt the careful balance of upstream and downstream state interests established elsewhere in the CWA, by giving downstream states an unlimited right to impose their standards on sources in upstream states. *See* Section I *infra*.

Second, the Tenth Circuit's imposition of a permit ban on upstream discharges similarly represents a major departure from the current administration of the NPDES program and the criteria governing the issuance of permits. As shown below, the court created this major new regulatory requirement essentially out of thin air, based solely on the court's view that the ban was necessary to fulfill the CWA's purposes. In fact, this compulsory and immediate ban on new permits conflicts with the statutory framework and will disrupt the permitting programs of EPA and the states. It will also result in a shutdown of new economic growth and industrial development in many regions of the country. The Tenth Circuit's unilateral imposition of such a radical new requirement infringes on the policymaking responsibility of EPA and conflicts with the limited role of a reviewing court recognized in *Chevron* v. *NRDC*, 467 U.S. 837 (1984). *See* Section II *infra*.

As shown below, the Tenth Circuit's decision on both issues presented will create tremendous uncertainty in ongoing and future permit proceedings. Its first holding will inevitably provoke and exacerbate a number of state-versus-state disputes and downstream state challenges in permit proceedings. Its second holding, at a minimum, will enormously complicate permit proceedings and inundate permitting agencies with data requirements and hearing requests. Together, these rulings will create unprecedented confusion for permitting agencies and applicants and disrupt ongoing efforts to improve water quality. *See* Section III *infra*.

I. THE ISSUE OF WHETHER DOWNSTREAM STATE STANDARDS APPLY IN PERMIT DECISIONS FOR SOURCES IN UPSTREAM STATES SHOULD BE RESOLVED BY THIS COURT.

Disputes among the states over the authority to regulate water quality on interstate waterways have provoked extensive litigation during the past two decades. The vast majority of the nation's rivers and streams either cross state borders or feed interstate waterways, and recurring disputes over these waters have required review by this Court on numerous occasions. *See, e.g., Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*); *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987).[8] The importance of the issues, the implications for state sovereignty, and the state-versus-state character of these disputes all create a compelling need for resolution of these cases by this Court and for clear guidance to the states and EPA.

The instant case similarly requires plenary review, not just to resolve a longstanding dispute between Arkansas and Oklahoma, but to settle a fundamental question for all states about the applicability of downstream state standards in CWA permit proceedings. Moreover, as demonstrated below, the Tenth Circuit's decision on this issue conflicts with the decisions of this Court, threatens

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[8] *See also Oklahoma* v. *Arkansas*, 460 U.S. 1020 (1983) (denying motion for leave to file a bill of complaint); *Scott* v. *City of Hammond, cert. denied*, 469 U.S. 1196 (1985); *Tennessee* v. *Champion Int'l Corp., cert. granted, judgment vacated and remanded*, 479 U.S. 1061 (1987); *Arkansas* v. *Oklahoma*, 488 U.S. 1000 (1989) (denying motion for leave to file a bill of complaint).

to disrupt the balance of state interests under the Clean Water Act, and creates a substantial conflict with the decisions of other circuits and state courts.

A. The Tenth Circuit's Holding Conflicts With The Decisions Of This Court Holding That One State Cannot Regulate Sources In An Adjoining State.

The issue of whether downstream states have authority to regulate sources in upstream states has come before the Supreme Court in at least three contexts during the past decade. In each of these contexts, this Court has decided that downstream states do not have such rights. The Tenth Circuit's holding that allows a downstream state to control the permitting for out-of-state sources conflicts with the holdings and premise of this Court's decisions in all three contexts.[9]

In the first of these contexts, this Court held that the enactment of the CWA foreclosed downstream states from bringing federal common law actions to "regulate" discharges in upstream states. *Milwaukee II*, 451 U.S. 304 (1981). This holding rested fundamentally on the conclusion that while Section 510 of the CWA did indeed allow a state to adopt more stringent water quality standards for its own waters than the federal criteria, the CWA did *not* allow a state to apply such standards against an out-of-state source. Thus, "[s]tates may adopt more stringent limitations through state administrative processes, or even . . . may establish such limi-

[9] The fundamental premise underlying all of this Court's decisions on interstate water quality disputes is that considerations of interstate equality and sovereignty prevent one state from imposing its standards on another state:

> [No] state can legislate for, or impose its own policy upon the other . . . . One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.

Kansas v. *Colorado*, 206 U.S. 46, 95-98 (1907).

tations through state nuisance law, and apply them to *in-state* discharges." *Id.* at 328 (emphasis added). Nevertheless, the Court recognized a sharp distinction between the regulation of in-state and out-of-state sources, for "[i]t is quite another [thing] to say that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to *out-of-state* dischargers." *Id.* (emphasis added).

In the second context, this Court held that the CWA preempts downstream states from bringing actions under their own common law to "regulate" sources in an upstream state. *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987). The distinction between in-state and out-of-state sources was again the key premise of the holding. Based on this important distinction, the Court held that the CWA does not preempt a state from applying its own common law to in-state sources, but *does* preempt application of that law to out-of-state sources. As a result of this delineation in regulatory authority, "when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located." *Id.* at 487.

The third context where this Court has addressed the issue of downstream state authority also arose in *Ouellette* and parallels the precise issue decided by the Tenth Circuit. Specifically, as the predicate for its preemption holding, this Court carefully interpreted the CWA provisions relating to interstate water quality disputes and concluded that under the Clean Water Act, a downstream state "only has an advisory role in regulating pollution that originates beyond its borders." *Id.* at 490. While an "affected" downstream state must be notified of a pending permit and afforded an opportunity to object, the downstream state *cannot* block issuance of the permit in th[illegible]eam state:

> [A]n affected State does *not* have the authority to block the issuance of the permit if it is dissatisfied

> with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the *discretion* to disapprove the permit if he concludes that the discharges will have an *undue impact* on interstate waters. . . . Thus the Act makes it clear that affected States occupy a *subordinate* position to source States in the federal regulatory program.

Id. at 490-91 (emphasis added).

The Court's interpretation of the CWA as not allowing a downstream state to impose its stricter water quality standards on an out-of-state discharge was the *sine qua non* of the Court's holding that the CWA preempted the common law of a downstream state but not of the source state. In particular, the Court held that the extraterritorial application of the downstream state's common law would conflict with the CWA's prohibition against applying downstream water quality standards to regulate an out-of-state discharge. As this Court put it, the application of the common law of a downstream state is preempted because it would allow downstream states to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *Id.* at 495.[10]

The Tenth Circuit's decision squarely contradicts the allocation of authority recognized in all of these decisions. Under *Ouellette*, EPA can elect to impose stricter limitations on an upstream source to protect the water quality of a downstream state, but the downstream state has no right to force EPA or the source state to adopt

[10] The Tenth Circuit characterized this discussion of the Clean Water Act as *dicta*, which it declined to follow. App. 26a. In fact, this construction of the CWA was a necessary element of the Court's holding that the CWA preempted application of Vermont nuisance law against a discharge located in New York. Since the Court found that the CWA had neither expressly preempted state law nor completely occupied the field, the Court was actually *required* to interpret the CWA provisions allocating interstate authority, in order to determine whether the state law action conflicted with the Congress' specific allocation of responsibility among upstream and downstream states. *See* 479 U.S. at 492.

stricter limitations. In the present case, EPA concluded that the Fayetteville discharge would have no adverse impact on Oklahoma water quality, and that no additional limitations on the Fayetteville discharge were necessary to protect Oklahoma water quality.

Instead of deferring to EPA's delegated discretion to balance the interests of upstream and downstream states, the Tenth Circuit adopted a fundamentally different approach which requires an out-of-state facility to strictly comply with the water quality standards of a downstream state. Moreover, the court's decision strips EPA of any discretion to apply or interpret the downstream standards, to disregard standards that are blatantly discriminatory, or otherwise unreasonable, *see* note 14 *infra*, or to assess compliance with the downstream standards. In effect, the Tenth Circuit's decision gives downstream states unlimited power to regulate sources in an upstream state, even when the out-of-state discharge would have no detectable impact on downstream water quality. This conflict with the decisions in *Milwaukee II* and *Ouellette*, and with well-established principles of interstate equality and sovereignty, will severely affect all downstream states and plainly requires review by this Court.

B. The Decision Below Conflicts With Congress' Balance Of Upstream And Downstream Rights And Will Disrupt Administration Of The Clean Water Act.

Another reason the Tenth Circuit's decision warrants review is that it conflicts with the CWA and disrupts the careful balance of state interests established by that Act. As this Court explained in *Ouellette*, the CWA "carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA." 479 U.S. at 497. By giving downstream states unlimited power to impose their regulatory standards on out-of-state sources, the Tenth Circuit's decision destroys this delicate balance between the interests of upstream and downstream states.

The most obvious conflict with the statutory scheme relates to Section 510 of the Act. This provision allows states to adopt water quality standards that are significantly stricter than the minimum federal criteria. The Tenth Circuit seemed to believe this authority was tempered by the need to obtain EPA approval for such standards. App. 14a n.5. In fact, however, both EPA and reviewing courts have long concluded that EPA lacks the authority to disapprove the adoption of more stringent standards by a state, even though EPA may consider them unnecessary, unreasonable, or otherwise inappropriate. Rather, EPA can only review these state standards to ensure that they at least meet the minimum federal criteria. *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979); *see also* 54 Fed. Reg. 39,099 (1989); *Mississippi Commission on Natural Resources* v. *Costle*, 625 F.2d 1269, 1273 (5th Cir. 1980). This recognition of blanket authority makes sense when a state is setting more stringent standards solely for in-state sources, as this Court allowed in *Milwaukee II*. But it will create the regulatory equivalent of gridlock if downstream states can set such standards and compel compliance by sources in all upstream states. Yet that is precisely the consequence of the Tenth Circuit's decision, and EPA will be left with no power to clear the impasse.

In addition, the Tenth Circuit's approach conflicts with the statute's carefully balanced consultative process for considering downstream state water quality standards when making permit decisions. These statutory provisions clearly provide only an advisory role for downstream states and give EPA the discretion to make reasonable accommodations between the interests of upstream and downstream states. For example, when a state acts as the permitting authority—which is the situation now for most states[11]—Section 402(b)(5) requires the permitting state to notify a potentially affected

[11] As of March 1990, thirty-eight states and the Virgin Islands had been delegated permitting authority under the CWA. [1 State Water Laws] Env't Rep. (BNA) 611:0111.

state of a permit application, and to provide the downstream state an opportunity to submit written recommendations. Nevertheless, the statutory procedure does *not* require the permitting state to accept the downstream state's recommendations; its only obligation under the Act is to notify the downstream state and EPA in writing if it decides not to accept the downstream state's recommendations.

However, if the permitting state does reject the recommendations of a downstream state, EPA may then decide to veto the permit under Section 402(d)(2)(A). EPA's authority to veto the permit is also discretionary, and a decision not to veto a permit is unreviewable in federal courts. *See, e.g., District of Columbia* v. *Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980).[12] Together, these consultative provisions encourage negotiated solutions and give both the permitting state and EPA the authority to impose additional discharge limitations that will protect the water quality of a downstream state. But the Act clearly does not require such additional limitations, and the statutory procedure obviously withholds from downstream states the power to insist that their standards be imposed on an out-of-state source.

The statute provides a similar advisory mechanism when EPA is the permitting authority for a discharge that may have interstate effects. Under Section 401(a)(2), EPA must first make an initial threshold finding whether the discharge will adversely affect the water quality of a downstream state. If EPA does make such a finding, the downstream state may then notify the permitting agency in writing of its objections to the proposed permit, and may request a public hearing. Based on the evidence presented at the hearing, EPA must then determine whether any additional limitations on the pro-

[12] EPA has "almost unfettered discretion" to decline to veto a state-issued permit even if the permit violates applicable guidelines or standards established under the Act. *Mianus River Preservation Comm.* v. *EPA*, 541 F.2d 899, 907-09 (2d Cir. 1976); *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282, 1294-95 (5th Cir. 1977).

posed discharge are necessary to protect the water quality of the downstream state.

This carefully constructed consultative process would be rendered meaningless by the Tenth Circuit's decision, which automatically requires out-of-state sources to rigidly comply with a downstream state's water quality standards.[13] The court's decision thus leaves no room for the balancing of state interests, and it leaves no apparent limits on the power of a downstream state to adopt unreasonably strict water quality standards and impose them unfairly on out-of-state sources.[14] As a result, the

[13] As the United States explained in its brief as amicus curiae opposing certiorari in *Scott* v. *City of Hammond*, allowing a downstream state to regulate an out-of-state source would disrupt the delicate balance established by the Clean Water Act:

> The CWA creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. The federal government establishes threshold pollution control requirements, subject to state decisions to "adopt more stringent limitations through state administrative processes, [or] establish such limitations through state nuisance law, and apply them to *in-state* dischargers." Under this partnership, the states must defer to the federal government's choice of minimum national requirements, but they reserve the unqualified power to determine to what degree they wish to impose more stringent pollution limitations within their borders. If . . . one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed. Where several states are situated on a particular body of water the state that has the most stringent limitations will displace the federal government as the arbiter of minimum pollution control requirements; this result is clearly contrary to the "full purposes and objectives of Congress."

Brief for the United States as Amicus Curiae at 10, *Scott* v. *City of Hammond, cert. denied*, 469 U.S. 1196 (1985) (No. 84-21) (emphasis in original) (citations omitted).

[14] By imposing very strict water quality standards on only the first few miles of an interstate waterway after it enters the state, a downstream state can impose stringent requirements on sources in an upstream state without imposing similar restrictions on in-state sources. This is precisely what has happened here. Oklahoma declared the segment of the Illinois River immediately inside its border an outstanding National resource and adopted extremely strict water quality standards for this segment of the river only. Since Arkansas sources are upstream from this segment, they must comply with these harsh standards under the Tenth Circuit's decision. At the same time, Oklahoma has adopted far less stringent standards further downstream, where most Oklahoma sources discharge effluent into the Illinois River.

Tenth Circuit's one-sided construction not only creates a fundamental conflict with the balance struck by Congress, but it also undermines any basis for interstate cooperation and threatens to seriously disrupt administration of the Act.

C. The Court Of Appeals' Decision Also Conflicts With The Decisions Of Courts In Other Circuits And States.

Finally, the Tenth Circuit's holding on the extra-territorial application of state water quality standards should be reviewed because it conflicts with the decisions of courts in other circuits and states. Indeed, until now every other final decision addressing the issue has concluded that a downstream state cannot impose its standards on an out-of-state source.

In *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied sub nom., Scott* v. *City of Hammond*, 469 U.S. 1196 (1985), the Seventh Circuit held that applying either the regulatory standards or common law of a downstream state against an out-of-state facility would "lead to chaotic confrontation between sovereign states" and would make it "virtually impossible to predict the standard for a lawful discharge into an interstate body of water." *Id.* at 414. In construing Section 510 of the CWA, which permits a state to adopt water quality standards that are stricter than the minimum federal criteria, the Seventh Circuit stated:

> In the light of the structure of [the CWA], with its emphasis upon the role of the state where the discharge in question occurs, except for provisions ex-

> pressly protecting the interests of other states, and in the light of the conflict and confusion which could result from any different construction, we conclude that this provision refers to the right of a state with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state.

Id. at 413. This interpretation of the CWA was also supported by the United States in its amicus brief successfully urging this Court not to review the Seventh Circuit's decision.[15]

Similarly, in a case decided shortly after the Tenth Circuit's decision, and which involved another new Arkansas facility that allegedly had the potential to violate Oklahoma water quality standards, the D.C. Circuit followed this Court's construction of the CWA in *Ouellette* and held that only Arkansas' (and not Oklahoma's) water quality standards were applicable to the Arkansas facility. *National Wildlife Federation* v. *Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990). The D.C. Circuit noted with approval that "[o]ther states, even if they are affected by a discharge, have only an advisory role in regulating the discharge, and they do not have the authority to block the issuance of permits if they are dissatisfied with the proposed standards." *Id.* at 1483.

The Tennessee Supreme Court has also recently held that under the CWA provisions at issue here, Tennessee could not require a discharger located in North Carolina to comply with Tennessee water quality standards. *State* v. *Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986). The court concluded that "[e]ach state . . . clearly operates within the sphere of its own jurisdiction, and may

[15] *See supra* note 13. Arkansas recognizes that the federal government has not always taken a consistent position regarding the applicability of downstream state standards in permitting decisions. Nevertheless, this fact itself emphasizes the compelling need for this Court to definitively resolve this issue under the Clean Water Act.

not . . . control points of discharge lying within the jurisdiction of other states." *Id.* at 574.[16]

In sum, this Court should grant certiorari because the Tenth Circuit's decision regarding the extra-territorial application of downstream standards creates a conflict with the decisions of this Court, other circuits, and state courts, and will disrupt the balance of interests struck by Congress in the Clean Water Act.

II. THE TENTH CIRCUIT'S IMPOSITION OF A PERMIT BAN IN ALL AREAS UPSTREAM FROM EXISTING VIOLATIONS ALSO REQUIRES SUPREME COURT REVIEW.

The second issue presented also has nationwide implications and is critical to the administration of the Clean Water Act. As described above, the Tenth Circuit held that the existence of a water quality violation on one downstream segment of a waterway precludes the issuance of a new NPDES permit on any upstream segment or tributary of that waterway. App. 79a-80a. Thus, the court's finding of prior and unrelated violations on sections of the Illinois River *in Oklahoma* triggered an ex-

[16] This decision was subsequently vacated, apparently on a separate ground, and remanded to the Tennessee Supreme Court for further consideration in light of *Ouellette*. 479 U.S. 1061 (1987). While *Ouellette* and the Tennessee Supreme Court's decision were in agreement that the law of a downstream state could not be applied against an out-of-state discharger, the two decisions were in conflict over whether the courts of a downstream state could exercise jurisdiction over an out-of-state facility to apply the law of the source state.

The same Tennessee-North Carolina dispute was also brought to federal court, where a district court held that a downstream state's water quality standards should not be a decisive factor in the permitting decision for a facility proposing to discharge into an interstate waterway, although they were a "relevant factor" that the EPA Administrator could consider. *Champion International Corp.* v. *EPA*, 652 F. Supp. 1398, 1400 (W.D.N.C. 1987). On appeal, the Fourth Circuit emphasized that it agreed with much of the district court's decision, but it ultimately vacated the district court's decision for lack of subject matter jurisdiction. 850 F.2d 182 (4th Cir. 1988).

traordinary ban on granting new permits *in Arkansas* for discharges that contain the same pollutant.

The drastic repercussions and extreme nature of this new rule are demonstrated by the court's decision not even to remand this proceeding to EPA. So long as *any* amount of effluent would reach the areas of violation in Oklahoma, EPA was required to deny the permit. EPA's prior findings that the Fayetteville discharge would have no detectable effect on downstream water quality and would not contribute to any Oklahoma violations were legally irrelevant, as was the actual cause of the violation in Oklahoma. As shown below, this draconian construction of the Act radically alters the statutory scheme, threatens to initiate a permit ban throughout much of the nation, and manifestly warrants plenary review by this Court.

A. A Ban On New Permits Upstream From Any Violation Of Relevant Water Quality Standards Is A Radical Departure From The Statutory Scheme.

The Tenth Circuit's holding represents a radical departure from the framework and language of the CWA. Congress never intended nor envisioned that an existing water quality violation would preclude new discharges. At the time the 1972 Amendments were enacted, many of the nation's waterways were severely polluted,[17] yet Congress never suggested that this would require a ban on new permits for affected waterways. Rather, Congress adopted a fundamentally different approach to gradually achieve acceptable water quality on polluted waterways by imposing effluent limitations on point sources that were to become progressively more stringent with time.[18] Although more stringent effluent limitations

[17] *See* S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 1972 U.S. Code Cong. & Admin. News. 3668, 3674.

[18] As originally enacted, the 1972 Amendments required point sources other than publicly owned treatment works to achieve the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983. Pub. L. No. 92-500, § 2, 86 Stat. 816, 844-45 (1972). The timetable for achieving the latter standard was subsequently relaxed to March 31, 1989. *See* CWA § 301(b).

are required for new sources under Section 306, there is no discussion in the CWA or its legislative history of a ban on new permits when there is an existing violation of water quality standards.

The Tenth Circuit itself admitted it could find no "explicit imprimatur" in the CWA for holding that the Act requires a ban on new permits upstream from a violation of a relevant water quality standard. App. 81a. In fact, the court's holding is directly inconsistent with Section 303(d) of the Act, the only provision in the CWA that addresses existing violations of water quality standards. Section 303(d) requires states with existing violations to establish maximum daily loads designed to bring affected water segments into compliance.[19] However, Section 303(d) does not require states to immediately establish maximum daily loads for all waterways with existing violations. Instead, a state may establish maximum daily loads according to the state's own priority ranking of its waterways, with no fixed deadline for completing the process for all waterways. CWA § 303(d)(1)(A). Moreover, even if a maximum daily load has been established for a waterway, new discharges or increased discharges from existing sources would be allowed provided they are included in the maximum daily load allocation. Thus, Section 303(d) gives source states a flexible and gradual mechanism for establishing priorities and, when the time is appropriate, allocating equitably the burden of reducing discharges. The Tenth Circuit's immediate and absolute ban is fundamentally inconsistent with this statutory scheme.

[19] A maximum daily load is the total quantity of effluent that can be discharged into a waterway per day without exceeding the relevant water quality standards.

B. The Tenth Circuit's Holding Requiring A Ban On New Permits Will Have Enormous, Detrimental Consequences Across The Nation.

The Tenth Circuit's imposition of a construction ban upstream from an existing violation of a relevant water quality standard will severely disrupt economic development in many states, the construction plans for many new and proposed facilities, and the NPDES permitting programs of EPA and state agencies. A significant proportion of the nation's waterways have existing violations of water quality standards. According to EPA's most recent *National Water Quality Inventory*, thirty percent of the river and stream miles that have been assessed nationwide were found to be not fully in compliance with applicable water quality standards.[20] Because the Tenth Circuit's decision would effectively block any new discharge that is upstream from a segment with such a water quality violation, the decision has the potential to block all new permits on a large majority of the nation's waterways. Consequently, the Tenth Circuit's decision may essentially impose a freeze on new industrial development and economic growth in many regions of the country.

The Tenth Circuit's holding is also inconsistent with EPA's current administration of the CWA, and will cause serious disruption of the permitting program of EPA and the states. In considering the permit application of a point source discharge under the CWA, EPA and state permitting agencies usually do not make an assessment of other discharges into the waterway or of the downstream water quality. Rather, a permitting agency looks at each source individually to determine if that discharge will cause a water quality violation at the point of discharge.[21]

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[20] EPA, *National Water Quantity Inventory, 1988 Report to Congress* (EPA 440-4-90-003, Apr. 1990), at 1-3.

[21] *See* U.S. General Accounting Office, *Water Pollution: More EPA Action Needed to Improve the Quality of Heavily Polluted Waters* (GAO/RCED-89-38, Jan. 1989). Technically, a point source's compliance with water quality standards is usually measured at the edge of a designated area called a "mixing zone" that allows some dilution of the effluent. *See* EPA, *Water Quality Standards Handbook* (Dec. 1983).

Under the new rule announced by the Tenth Circuit, a permitting agency will be required to assess water quality on all downstream segments to determine if there are existing violations of relevant water quality standards. This requirement will present enormous practical problems for permitting agencies, especially since the water quality of only twenty-nine percent of the nation's stream miles has been evaluated.[22] Thus, the Tenth Circuit's decision will impose tremendous informational and administrative burdens on permitting agencies, which will be compelled to obtain data on downstream water quality and incorporate this information into the decision-making process for permit applications. The complexity and delays involved in permit decisions will be increased dramatically.

C. The Tenth Circuit's Ambitious Construction Conflicts With The Appropriate Role For A Reviewing Court Under The *Chevron* Decision.

The Tenth Circuit exceeded the proper role of a court by unilaterally extending the statutory scheme to impose a ban on new permits upstream from a water quality violation. This type of fundamental policy determination, which will have enormous consequences for the nation, is the appropriate domain of Congress and not the courts.

A ban on new sources upstream from an existing violation of a relevant water quality standard is analogous to the construction ban required in non-attainment areas under the Clean Air Act. 42 U.S.C. § 7410(a)(2)(I) (1988). However, the construction ban required by the Clean Air Act was enacted by Congress, whereas the Tenth Circuit acted without Congressional authorization

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[22] EPA, *supra* note 20, at 1. Furthermore, for the 29% of stream miles that have been evaluated, the reliability of the available data is questionable because of the inconsistent and imprecise methods that have often been used to assess water quality. *Id.* at 3.

or support in imposing a construction ban for non-attainment areas under the CWA. Furthermore, the construction ban imposed by the Tenth Circuit is much more extreme than the ban required by the Clean Air Act. The Tenth Circuit's ban is much broader because it extends beyond the area of non-attainment of ambient standards to also ban any new source upstream from an existing violation. In addition, the Tenth Circuit's ban is much more absolute than the equivalent requirement under the Clean Air Act. That Act permits the construction and operation of a new source in a non-attainment zone if it offsets its new emissions with an equivalent reduction of emissions from other sources in the same area. 42 U.S.C. § 7503 (1988). The Tenth Circuit's decision allows no comparable exception; the ban on new permits is absolute.

The Tenth Circuit's imposition of this ban thus clearly exceeds the appropriate role for a reviewing court under this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the first step of *Chevron*, a reviewing court must look to see whether Congress has directly spoken to the precise question at issue. *Id.* As discussed above, Congress did expressly address the problem of existing violations of water quality standards by enacting Section 303(d). Furthermore, as the Tenth Circuit itself acknowledged, App. 81a, Congress did not enact any express language requiring a ban on new permits when there is an existing water quality violation. The court of appeals, therefore, could find no expression of Congress' intent sufficient under *Chevron* to support imposing its permit ban.

Moreover, even if Congress' intent were not clear, the second step in the *Chevron* standard requires a reviewing court to defer to EPA's interpretation of the statute provided it is reasonable. As the Agency responsible for administering the CWA, EPA has never suggested that an existing violation of water quality standards automatically requires an absolute ban on new permits, especially for discharges that will have no detectable effect on

water quality.[23] Instead of deferring to EPA's long-standing interpretation of the CWA, the court adopted a novel construction of the Act which will dramatically change the substance and administration of the statute in violation of the court's responsibility under *Chevron*.

III. THE TENTH CIRCUIT'S DECISION ON THESE ISSUES THREATENS TO CAUSE WIDESPREAD DISRUPTION AND REQUIRES IMMEDIATE REVIEW.

Every publicly and privately owned facility that wishes to begin discharging into the nation's waters must obtain an NPDES permit. This includes municipal treatment plants, business establishments and manufacturers, and many federal agencies and projects. The facilities themselves and the technology developed to meet CWA requirements represent enormous investments, and the administrative process for obtaining permits often takes years. The Tenth Circuit's resolution of the two issues presented here, especially in combination, creates intolerable uncertainty about the law governing pending and future proceedings and necessitates immediate review by this Court.

A. The Tenth Circuit's Holding On The Applicability Of Downstream State Standards Will Cause Enormous Confusion And Unfairness In NPDES Permitting Decisions.

The Tenth Circuit's holding that EPA must rigidly apply the federally-approved water quality standards of

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[23] In some instances, of course, Section 303(d) of the Act and EPA's implementing regulations can restrict discharges from new sources. 40 C.F.R. § 122.4(i) (1990); *see* page 21 *supra*. These restrictions only apply after a state has established a total maximum daily load for a particular waterway, and even then, only in accordance with the priorities and allocation established by that state. Moreover, these restrictions would only apply to new sources that actually "cause or contribute to" a water quality violation. 40 C.F.R. § 122.4(i) (1990). Oklahoma has not established any such plan for the Illinois River, and this gradual mechanism bears no resemblance to the Tenth Circuit's compulsory and immediate ban.

downstream states when considering the permit applications of upstream facilities has the potential to create tremendous uncertainty for ongoing and future permit proceedings. Most streams and rivers in the lower forty-eight states cross state boundaries or flow into interstate waterways. Therefore, thousands of facilities that discharge into interstate waterways or their tributaries will have to assure compliance with the water quality standards of all downstream states when applying for or renewing their discharge permits.[24]

Under the Tenth Circuit's decision, permit proceedings will become much more complicated and uncertain as permitting agencies and the applicants struggle with the myriad of different state standards that may apply to a single discharge. The "important goals of efficiency and predictability in the permit system" recognized by this Court in *Ouellette*, 479 U.S. at 496, will be undermined by the patchwork of inconsistent state water quality standards that will apply to each permit. Additional evidence may be required concerning the impact on downstream states, and the new rules announced by the Tenth Circuit will require a different outcome in many proceedings.[25]

Under the court's decision, EPA will no longer be allowed the flexibility to carefully balance and accommodate the competing interests of upstream and downstream states and ensure that the burden of controlling pollution is allocated equitably between states. Down-

[24] According to statistics provided by EPA, there are currently over 75,000 outstanding NPDES permits in the nation. Since each permit is only valid for a maximum of five years, over 15,000 new or renewal permit applications must be processed each year.

[25] The Tenth Circuit's holding on the extra-territorial application of state water quality standards is already being applied nationwide. For example, EPA's Chief Judicial Officer recently concluded that the Tenth Circuit's decision required him to deny an evidentiary hearing requested by a North Carolina facility that was being forced to comply with Tennessee water quality standards. *Champion International Corp., Canton Mill*, NPDES Appeal 90-1, at 4-5 (Sept. 5, 1990).

stream states may attempt to use the Tenth Circuit's rigid decision to restrict unfairly the discharges from upstream states.[26] The court's decision will allow downstream states to impose their standards on upstream states, and will also create the potential for downstream states that have polluted their own waterways (or wish to reserve discharge rights for their own residents) to obstruct unfairly or discriminate against industrial activities in upstream states.[27] Furthermore, the uncertainty about the extra-territorial application of water quality standards created by the Tenth Circuit's decision will likely inflame many existing or potential water quality disputes between states and invite regional economic warfare in many areas of the country.

B. The Combined Nationwide Effect Of The Tenth Circuit's Two Holdings Will Be Devastating.

The nationwide impact of the Tenth Circuit's decision will be staggering when the court's first holding on the interstate application of water quality standards is combined with the second holding prohibiting new discharges upstream from a pre-existing violation of a relevant water quality standard. If the Tenth Circuit's decision was applied nationally, for example, a slight violation of Louisiana's water quality standards near the mouth of the Mississippi River would likely require that no new facility that discharges the offending pollutant could be permitted in the entire watershed of the Mississippi

[26] *See supra* note 14.

[27] The provision in the 1987 amendments to the CWA that authorizes EPA to treat an Indian tribe as a state for purposes of setting water quality standards will compound all of these problems. CWA § 518. In applying the Tenth Circuit's holding, a discharging facility will have to comply with the water quality standards of downstream Indian tribes as well as downstream states, creating further potential for confusion and disputes. EPA has already approved state status for at least one Indian tribe, and numerous others will be seeking approval.

River and all its tributaries, an area that comprises a substantial portion of the continental United States.[28]

Furthermore, the Tenth Circuit's decision will immediately create uncertainty about the ability to obtain permits for projects that are now under construction or development. Municipalities and other local authorities need a high level of confidence that new facilities they begin to construct will be permitted, since they cannot afford to waste scarce resources and spend years in administrative proceedings and litigation. Similarly, the uncertainty and risk of a rigid ban on new discharges will disrupt plans for new economic and industrial development, especially in regions of the country vulnerable to downstream objections.

Finally, if the decision of the Tenth Circuit is allowed to stand, opponents of new permits will now have a much greater reason to demand an evidentiary administrative proceeding to challenge almost any new or modified discharge permit. Under EPA's regulations, any interested party can contest a final permit decision by requesting an evidentiary hearing.[29] The request must set forth "material issues of fact relevant to the issuance of the permit" before it can be granted by EPA.[30]

In the past, evidentiary hearings have primarily been requested by permit applicants rather than permit opponents.[31] However, under the Tenth Circuit's decision, opponents of almost every new permit will easily be able to set forth "material issues of fact" to challenge an ap-

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[28] The only criterion for triggering the ban, under the Tenth Circuit's decision, is that some amount of the offending pollutant would have to reach the downstream segment that is experiencing a water quality violation.

[29] 40 C.F.R. § 124.71 (1990). Most states provide for a similar administrative appeal process to challenge state-issued NPDES permits.

[30] 40 C.F.R. § 124.75(a)(1) (1990).

[31] *See* Zemansky & Zerbe, *Adjudicatory Hearings as Part of the NPDES Permit Process*, 9 Ecol. L.Q. 1, 4 (1980).

proved permit on the grounds that there is a downstream violation of a relevant water quality standard. Under the Tenth Circuit's decision, the permit applicant and the permitting agency that issued the permit would have the burden of proof to demonstrate that there are no existing downstream water quality violations.[32] Given the prevalence and uncertainty of water quality violations, it will be very difficult for any permit to be approved under the Tenth Circuit's new rule.

Even if the source and permitting agency do succeed in making the requisite showing at the evidentiary hearing that there are no relevant downstream water quality violations, the delays and burdens imposed on the agency's permitting process by the increased requests for evidentiary hearings will be extensive. Statistics regarding past evidentiary hearings, which primarily dealt with much less complex issues than the existence of water quality violations, indicate that the hearing process frequently delays permitting decisions by three years or more.[33] As this Court has previously recognized, any significant increase in the number of evidentiary hearings "would raise serious questions about the EPA's ability to administer the NPDES program." *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 215 (1980). EPA and states with approved permitting programs will quickly be overwhelmed by a substantially increased number of evidentiary administrative proceedings under the CWA as a result of the Tenth Circuit's decision.[34]

---

[32] According to the Tenth Circuit, the "permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants [to] be discharged should be issued and not denied and this burden does not shift." App. 72a n.49 (quoting the ALJ's Initial Decision, App. 102a).

[33] Zemansky & Zerbe, *supra* note 31, at 16.

[34] The Tenth Circuit's decision will also provide fertile grounds for petitions for judicial review of NPDES permits, and is likely to substantially increase the number of such cases that courts must decide. Parties dissatisfied with EPA's final permit decisions can

Only plenary consideration by this Court can avoid these immediate and severe consequences of the Tenth Circuit's decision and provide permitting states, EPA, permit applicants and lower courts the necessary guidance for interpreting the relevant provisions of the CWA.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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challenge the decisions in a U.S. Circuit Court of Appeals. CWA § 509(b)(1). Interested persons may also be able to file citizen suits to challenge EPA's failure to perform the non-discretionary duty to deny permits when there is an existing violation of a relevant downstream water quality standard. CWA § 505(a)(2).

90-1262

No. ———

Supreme Court, U.S.
FILED
FEB 6 1991
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,
v.
STATE OF OKLAHOMA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 89-9503, 89-9507 and 89-9516

THE STATE OF OKLAHOMA, OKLAHOMA SCENIC RIVERS COMMISSION AND POLLUTION CONTROL COORDINATING BOARD; SAVE THE ILLINOIS RIVER (STIR), a non-profit corporation of the State of Oklahoma; CITY OF FAYETTEVILLE, ARKANSAS; THE BEAVER WATER DISTRICT; STATE OF ARKANSAS; ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

OKLAHOMA WILDLIFE FEDERATION,

Intervenor.

July 11, 1990

Robert A. Butkin (Robert H. Henry, Atty. Gen., and William J. Holmes, Asst. Atty. Gen., State of Okl., Ed Edmondson and Julian K. Fite, Muskogee, Okl., on the briefs), Oklahoma City, Okl., for petitioners, State of Okl., Oklahoma Scenic Rivers Com'n and Pollution Control Coordinating Bd.

John Steven Clark, Atty. Gen. (R.B. Friedlander, Sol. Gen., Attys. for State of Ark., Steven Weaver, Anne Roberts Bobo, Attys. for Arkansas Dept. of Pollution Control & Ecology, Little Rock., Ark., James N. McCord, Atty. for City of Fayetteville, Ark., Niblock Law Firm, Atty. for Beaver Water Dist., Fayetteville, Ark., on the brief), for petitioners, City of Fayetteville, Ark., Beaver Water Dist., State of Ark., Arkansas Dept. of Pollution Control and Ecology.

Gary Guzy (Catherine A. Winer, Pat Rankin, U.S. E.P.A., and Richard B. Stewart, Asst. Atty. Gen., with him on the briefs), U.S. Dept. of Justice, Washington, D.C., for respondent.

Ed Edmondson, Muskogee, Okl., appearing for Save the Illinois River.

Before ANDERSON and BRORBY, Circuit Judges, and THEIS,* District Judge.

BRORBY, Circuit Judge.

In these consolidated appeals, appellants challenge certain actions of the U.S. Environmental Protection Agency (EPA) in issuing a discharge permit pursuant to the National Pollutant Discharge Elimination System (NPDES) of the Clean Water Act, 33 U.S.C. § 1342. We review EPA's action pursuant to our authority under 33 U.S.C. § 1369(b)(1) and reverse.

OVERVIEW

The city of Fayetteville, Arkansas, applied to EPA for an NPDES permit for a new municipal wastewater treatment plant. Fayetteville proposed to discharge treated wastewater via a split flow into the White River in Akansas and into Mud Creek, a tributary of the Illinois River, an Arkansas-Oklahoma interstate stream.

---

* The Honorable Frank G. Theis, Senior United States District Judge for the Distr of Kansas, sitting by designation.

The State of Oklahoma and a nonprofit group, Save The Illinois River (STIR), requested denial of the permit. The State of Arkansas and the Oklahoma parties requested an evidentiary hearing on EPA's issuance of the permit. A hearing request was granted in part and denied in part by an Administrative Law Judge (ALJ), and the partial denial was upheld by the EPA Administrator acting through his Chief Judicial Officer (CJO). After the evidentiary hearing, the ALJ determined that the permit would not have an undue impact on water quality or violate Oklahoma's water quality standards (WQS). This initial decision was appealed by both Arkansas and Oklahoma. On appeal, the ALJ's decision was affirmed in part and reversed in part and remanded for a determination whether the record showed by a preponderance of the evidence that the permitted discharge would not cause an actual, detectable violation of WQS. On remand the ALJ reviewed the record and made detailed findings. He concluded that the permit could issue as written, finding that it would not result in any measurable violations of Oklahoma's WQS. The ALJ's decision on remand was appealed to the CJO who upheld it in a decision dated December 22, 1988. These petitions for review followed.

Appellants the State of Oklahoma, Oklahoma Scenic Rivers Commission, Oklahoma Pollution Control Coordinating Board, and STIR (the "Oklahoma parties," or Oklahoma) set forth ten issues in their joint brief-in-chief. Essentially they contend that EPA erred in concluding that the permit would not violate Oklahoma's WQS; that EPA did not properly consider the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (WSRA), as it applies to the upstream portions of the Illinois River; and that EPA erred in denying review of certain issues and in refusing to reopen the evidentiary hearing. The State of Arkansas, Arkansas Department of Pollution Control Ecology, City of Fayetteville, and Beaver Water District (the "Arkansas parties," or Arkansas) challenge

EPA's authority to require an Arkansas discharger to comply with Oklahoma water quality standards.

BACKGROUND

The cornerstone of the Clean Water Act, 33 U.S.C. §§ 1251-1387, is its prohibition of any discharge of pollutants to navigable waters except as permitted by the Act. 33 U.S.C. § 1311(a). Section 101 of the Act, 33 U.S.C. § 1251(a)(1), states that "it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985." "Discharge of a pollutant" is defined expansively as "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A). "Pollutant" is also broadly defined; it includes "dredged spoil, solid waste, . . . sewage, garbage, sewage sludge, . . . chemical wastes, . . . rock, sand, . . . and industrial, municipal, and agricultural waste." § 1362(6). "Point source" encompases "any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." § 1362(14). "Navigable waters" means "the waters of the United States." § 1367(7).

Discharges of pollutants must comply with limitations established in and pursuant to the Act. "Effluent limitations," i.e., limits on "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources," § 1362(11), may be water quality-based, §§ 1312, 1313, or technology-based, §§ 1311(b), 1314(b). EPA is required to establish water-quality based restrictions whenever technology-based limits are inadequate to protect a particular body of water. § 1312(a). The CWA sets minimum requirements for water pollution control; states may devise more stringent measures. § 1370. State standards, once approved by EPA, become the water quality standards for the applicable waters of the State. § 1313.

Federal and state effluent limitations and water quality standards are transformed into individual point source obligations through NPDES discharge permits. § 1342; *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205, 96 S.Ct. 2022, 2025, 48 L.Ed. 2d 578 (1976). Permits may be issued if the discharge will meet all applicable requirements under the Act. § 1342(a)(1). EPA is responsible for issuing permits, *id.*, but may delegate that authority to qualified states, § 1342(b). In those states, however, it retains oversight authority with respect to individual permits and the permitting programs in general. § 1342(c), (d).

EPA issued Fayetteville's NPDES permit because at the time this proceeding commenced Arkansas had not yet been delegated permitting authority pursuant to § 1342(b). The permit was issued on November 5, 1985, and finally approved on December 22, 1988, following the administrative appeals described above. The treatment plant has been in operation since December 1988.

The permit (NPDES Permit No. AR0020010) specifies that half of the city's treated wastewater will be discharged to the White River in Arkansas (this portion of the discharge is not in contention here), and half will be discharged to the Illinois River basin. Specifically, this latter effluent will be discharged to an unnamed stream in northwestern Arkansas, which flows approximately two miles before joining Mud Creek. Mud Creek flows three miles from that point to its confluence with Clear Creek, thirteen miles upstream from the Illinois River in Arkansas. Twenty-two miles downstream from Clear Creek—and thirty-nine miles from the Fayetteville plant—the Illinois River crosses the state line into northeastern Oklahoma and almost immediately flows into Lake Frances. A segment of the Illinois River (including Lake Frances) from the Oklahoma-Arkansas state line to Tenkiller Ferry Reservoir has been designated an Oklahoma state scenic river and was proposed for study as a po-

tential addition to the National Wild and Scenic Rivers System when the WSRA was enacted in 1970. 16 U.S.C. § 1276(40). To date, this segment, which is approximately sixty miles long, has not been designated a component of the national system. *See* 16 U.S.C. § 1273.

The Fayetteville permit sets limits on the amounts of certain pollutants that may be discharged and establishes maximum or minimum effluent concentrations of those pollutants and other chemical parameters. Permit, EPA Supp. Addendum at 12-30. The permit prohibits the discharge of any incompletely treated effluent to Mud Creek. *Id.* at 27. It also includes, *inter alia*, a provision for modifying the permit to incorporate more stringent limitations if an ongoing study of the Illinois River demonstrates such limitations are needed to ensure compliance with water quality standards. *Id.*

ANALYSIS

I. Standard of Review

Review of the EPA rulings on appeal here is governed by the Administrative Procedure Act, 5 U.S.C. §§ 701-706. We must uphold the agency's actions, findings, and conclusions unless they are outside the agency's statutory authority, are not supported by substantial evidence, or are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A), (C), and (E). We may not substitute our judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

> Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors

> and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43, 103 S.Ct. at 2866 (citations omitted).

Determining the extent of EPA's authority under the Clean Water Act is a question of law that we review de novo. "Our first inquiry is whether 'Congress has directly spoken to the precise question at issue. If the intent of Congress is clear that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059, 1065 (10th Cir.1987) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984), *rev'd on other grounds*, 486 U.S. 204, 108 S.Ct. 1765, 100 L.Ed.2d 238 (1988)). However, where the statute is ambiguous, EPA's construction, as that of the agency charged with administering the statute,[1] is entitled to substantial deference. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). If EPA's interpretation of the Clean Water Act is reasonable, we should not disturb it unless it "is contrary to the policies Congress sought to implement in enacting the statute." 813 F.2d at 1065; *see also* 467 U.S. at 845, 104 S.Ct. at 2783.

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[1] 33 U.S.C. § 1251(d) provides: "Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency . . . shall administer this chapter."

II. Preliminary Procedural Matters

As an initial matter we address EPA's argument that Arkansas lacks standing to challenge EPA's interpretation of the Clean Water Act. EPA reasons that

> Arkansas, by not challenging any of the terms of the Fayetteville permit, has failed to state a justiciable case or controversy. . . . Arkansas' claim is purely hypothetical and would not be redressed by a favorable decision of this Court, just as its allegations as to future permit conditions are purely speculative.

EPA Brief at 13-14. EPA also rejects Arkansas's argument that it may be collaterally estopped in subsequent proceedings if it does not pursue this argument now by assuring Arkansas that EPA would not contest the justiciability of the claim if raised in the context of future permit decisions. EPA Brief at 14; *see* Arkansas Reply Brief at 11 n. 18.[2]

Section 509 of the Clean Water Act provides that "[r]eview of [EPA's] action . . . in [, *inter alia*,] issuing or denying any permit under section 1342 of this title . . . may be had *by any interested person.*" 33 U.S.C. § 1369(b) (emphasis added). The legislative history corroborates what the language itself suggests—that the Act intended liberal review of EPA's actions in issuing permits and promulgating rules and standards. The Senate Public Works Committee explained section 509's judicial review provision as follows:

> *Any person* has standing in court to challenge administratively developed standards, rules and regulations under the Act. The courts are increasingly adapting this test to what administrative actions are reviewable. . . . The Courts have granted this review to those being regulated and to those who seek "to protect the public interest in the proper administration of a regulatory system enacted for their benefit." Since precluding review does not appear to be warranted or desirable, the bill would specifically provide for such review within controlled time periods. . . .
>
> . . . For review of permits issued under section 402 [33 U.S.C. § 1342] . . . , the section places jurisdiction in the U.S. Court of Appeals. . . .

S.Rep. No. 414, 92d Cong. 2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News 3668, 3750-51 (emphasis added; citation omitted); *see also* Conf.Rep. No. 1236, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3776, 3825. The Supreme Court reiterated the expansive language of the Senate Report in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n. 23, 101 S.Ct. 2615, 2623 n. 23, 69 L.Ed.2d 435 (1981) ("review provisions of 509 are open to '[a]ny person,' S.Rep. No. 92-414, p. 85 (1971)"); *cf. Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 576-78 (D.C.Cir.1981) (§ 509 "incorporate[s] the injury in fact rule for standing set out in *Sierra Club v. Morton*," 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)).

It would strain the meaning of "any interested person" to exclude from those eligible to obtain review of an EPA permit action the state in which the publicly owned treatment works seeking the permit is located, which partially

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[2] Arkansas also attempted to raise the Clean Water Act interpretation issue in another forum. In September 1988 it moved for leave to file a complaint against Oklahoma in the Supreme Court, invoking the Court's original jurisdiction under Article III, section 2, of the Constitution. The United States opposed the motion, arguing (according to Arkansas) that the statutory question could more appropriately be resolved in the context of judicial review of the issuance of Fayetteville's permit. Arkansas Reply Brief at 11 n. 18; EPA Brief at 10. The Supreme Court denied Arkansas's motion. *Arkansas v. Oklahoma*, 488 U.S. 1000, 109 S.Ct. 776, 102 L.Ed.2d 769 (1989). Arkansas now argues that "it cannot rely to its detriment on such 'assurances' from the EPA in this case for the same reason it could not rely on the United States' 'assurances' in [*Arkansas v. Oklahoma*]." Arkansas Reply Brief at 11 n. 18.

financed the facility's construction, and which, among other entities, has review and approval authority over the facility's construction and operation. We conclude Arkansas does have standing to challenge EPA's determination that Oklahoma water quality standards apply to the plant.[3]

Before undertaking a discussion of the merits, we must consider a second procedural issue—whether Arkansas has exhausted its administrative remedies. EPA's regulations provide that a petition "for review of any initial decision . . . is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final decision of the Agency." 40 C.F.R. § 124.91(e). The rule requires EPA to "issue an order either granting or denying the petition for review" within a reasonable time after the petition is filed. § 124.91(c)(1). "Final Agency action" for purposes of judicial review occurs "upon completion of the remanded proceeding, including any appeals to the [EPA] Administrator from the results of the remanded proceeding." § 124.91(f)(3).

Although the parties do not raise this issue, we have detected two arguable procedural deficiencies in Arkansas's appeal in light of § 124.91. First, the Arkansas parties may have failed to comply with the technical requirements of subsection (e). Although they filed a petition for review of the ALJ's decision on remand, R., B-155, it appears they did not file a petition for review of the ALJ's *initial* decision as required by the rule, but merely filed a response to the Oklahoma parties' petitions for

[3] Moreover, we could reach the statutory construction issue—a legal question—even if we were to decide Arkansas lacked standing to raise it. Whether EPA acted within its statutory authority is subject to our review under 5 U.S.C. § 706(2)(A). Thus, we reject any suggestion by EPA that, if Arkansas lacks standing, this court lacks jurisdiction to decide the statutory issue on the merits. *See* EPA Brief at 14 n. 8, 15. For similar reasons we reject EPA's argument that Arkansas's claim is not ripe for review. EPA Brief at 14.

review of that decision. *Compare* Order on Petitions for Review, R., A-28 at 1, with EPA Brief at 8. Although "[t]he Arkansas parties raised [the statutory interpretation] issue in numerous pleadings filed with EPA," Arkansas Brief at 32 n. 24, Arkansas's argument that Oklahoma WQS should not apply to a discharge located in Arkansas was first asserted to (and rejected by) the ALJ *after remand* by the CJO.[4]

Secondly, EPA's action in this case was arguably not "complete" with respect to the Arkansas parties because the CJO failed to "issue an order either granting or denying [Arkansas's] petition for review." § 124.91(c)(1). Although all parties petitioned EPA for review of the ALJ's decision on remand, R., B-155-59, the CJO's second order ruled only on the petitions filed by EPA-Region VI and the Oklahoma parties. The order failed even to acknowledge Arkansas's petition. *See* Second Order on Petitions for Review, R., A-37, at 1-2.

Nevertheless, under the circumstances of this case, we do not view these shortcomings as fatal to Arkansas's appeal. EPA's position on the basic issue raised by the Arkansas parties—whether the Fayetteville discharge must comply with Oklahoma WQS—has been clear since the ALJ's initial decision and is directly at odds with Arkansas's position. In his second and final opinion the CJO clearly affirmed his June 1988 ruling that Oklahoma WQS are applicable to the Fayetteville discharge. In so doing, he implicitly, if not expressly, denied Arkansas's petition for review of the ALJ's decision on remand. Thus, it would be fruitless to remand to the agency for mere technical compliance with subsection (c)(1)'s requirement

[4] Moreover, Arkansas presented inconsistent arguments in the remand proceeding, claiming first that the 1982, not the 1985, Oklahoma WQS should apply, but then arguing that Oklahoma's Beneficial Use Limitations specifically cannot apply to a discharge located in Arkansas. *See* Decision on Remand, R., A-33, at 2-3; Supplemental Joint Briefs submitted by Arkansas Parties, R., B-144 at 7-8, 25-33.

for "an order . . . denying review." *Cf. Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Koerpel v. Heckler*, 797 F.2d 858, 862 (10th Cir.1986); *Clonce v. Presley*, 640 F.2d 271, 273 (10th Cir.1981) (citing *Lewis v. New Mexico*, 423 F.2d 1048, 1049 (10th Cir.1970)).

Moreover, no objection to Arkansas's failure to seek review of EPA's initial decision should now be allowed, given that Arkansas participated in the review of the initial decision (by responding to Oklahoma's petition) and the CJO expressly provided that the "*parties* will have the opportunity to petition for review of the ALJ's decision on remand." Order on Petitions for Review, R., A-28, at 17 (emphasis added). Accordingly, the Arkansas parties' appeal is ripe for our review, and we proceed with our discussion of the merits.

III. Statement of Issues

Arkansas poses the fundamental question in this case: Does the Clean Water Act require a point source of pollution to comply with the water quality standards of all affected downstream states? Oklahoma assumes such a requirement in that it challenges EPA's determination that the Fayetteville permit would not result in violations of Oklahoma's water quality standards and argues accordingly that no discharge to Oklahoma's Illinois River system should be allowed.

Oklahoma formulates the issues on appeal as "[w]hether the Chief Judicial Officer erred in denying review" of various ALJ rulings and whether the CJO and ALJ "erred in [refusing] to reopen the evidentiary hearing." Despite this formulation, it seems clear that the Oklahoma parties' chief concerns relate to the substantive issues underlying these procedural questions. The substantive issues are: (1) the adequacy of the treatment technology employed by the Fayetteville plant and the possible superiority of land application methods; (2) the propriety of considering evidence concerning future reductions in

the discharges of other Arkansas cities; (3) the propriety of relying on "protective language" in the permit authorizing more stringent discharge limitations if shown to be necessary by an ongoing study of the Illinois River; (4) the correctness of EPA's interpretation and application of Oklahoma's beneficial use limitation, nutrient standard, and anti-degradation policy; (5) the relevance of new information concerning overflows at the old treatment plant; and (6) whether Fayetteville met its burden of proof in showing that a permit should be issued for its treatment plant. Our review of the record convinces us that we need not resolve many of the issues raised by the Oklahoma parties. In the following pages we address first the statutory interpretation question posited by Arkansas and then a significant issue not raised by any party—the significance of evidence of existing degradation of Illinois River water quality.

A. *Construction of the Clean Water Act*

The Opposing Views

The full ramifications of Arkansas's formulation of the Clean Water Act issue are exposed once it is realized that an upstream state has the ability (if not the legal right) largely to control the quality of certain of the waters of a downstream state. It can accomplish this simply by setting and enforcing its own water quality standards and releasing water of that quality to the downstream state. If the upstream state's water quality standards are lower than those considered desirable by the downstream state, so will be the actual quality of the interstate waters in the downstream state. In other words, the lowest common denominator will prevail. The ultimate question posed to this court is whose water quality standards take precedence under the Clean Water Act—the upstream state's, the downstream state's, the federal government's, or nobody's. We conclude that no state "imposes" its standards on another state, but rather that the Clean Water Act mandates compliance with federal

law, including the federally approved water quality standards of affected states.

Specifically, Arkansas alleges an affected downstream state "may advise and make recommendations, but nowhere in the Clean Water Act did Congress authorize affected states such as Oklahoma to impose their water quality standards upon a discharger in another state." Arkansas's Brief at 39. We treat this, the principal issue of the case, as whether the Clean Water Act requires that any discharge permitted under 33 U.S.C. § 1342 comply with all applicable water quality standards, including the EPA-approved regulations of any affected downstream state.[5] This is an issue of first impression in the circuit courts.[6]

[5] We reformulate the issue to reflect more accurately the facts and legal context of this case. Section 303 of the CWA, 33 U.S.C. § 1313, requires periodic review by states of their WQS and provides for EPA approval of any modified WQS as long as such standard "meets the requirements" of the CWA. § 1313(c)(3). Once approved, "such standard shall thereafter be the water quality standard for the applicable waters of that State." *Id.* EPA is required to promulgate revised WQS for any state that fails to adopt WQS consistent with CWA requirements and in any case where EPA determines that a revised or new standard is necessary to meet the requirements of the Act. § 1313(c)(4).

The Fayetteville plant has been required by EPA to observe *federal* law, i.e., Oklahoma's EPA-approved water quality standards. *See* Order on Petitions for Review, R., A-28, at 11 n. 13. Thus, it is misleading to say "Oklahoma . . . impose[d *its*] water quality standards" on Arkansas, or that Oklahoma has the "right to block" a permit issued by Arkansas. *See, e.g.*, Arkansas's Brief at 33, 36, 38-40. The 1982 Oklahoma water quality standards, which EPA judged aplicable to the Fayetteville plant, had been approved by EPA. Whether Fayetteville might also be subject to observing Oklahoma state standards that have *not* received EPA approval is not an issue in this case, and we do not address it. Accordingly, throughout this opinion we use "applicable water quality standards" to mean *EPA-approved* water quality standards that govern the affected waters, and "Oklahoma water quality standards" to mean Oklahoma's *EPA-approved* water quality regulations.

[6] This statement requires a brief explanation of a recent Fourth Circuit case. In *Champion Int'l Corp. v. EPA*, 648 F.Supp. 1390

EPA's Chief Judicial Officer, in his first order in this case dated June 28, 1988, stated the law and applied it as follows:

(W.D.N.C.1986), *motion for withdrawal of mandate denied*, 652 F.Supp. 1398 (W.D.N.C.1987), the district court upheld EPA's assumption of permitting authority under 33 U.S.C. § 1342(d)(4) after EPA objected when North Carolina proposed to permit a discharge in North Carolina without regard for Tennessee water quality standards. The court held that a discharge permit must ensure compliance with the requirements of the CWA, and that EPA reasonably could have concluded that the North Carolina permit, in disregarding the Tennessee water quality standard for color, would not ensure such compliance. 648 F.Supp. at 1394-99. Upon reconsideration in light of an intervening Supreme Court case, however, the district court offered the following limiting statement: "Nothing in the regulatory framework surrounding the CWA would automatically require that a source state comply with the water quality standards of every downstream state." 652 F.Supp. at 1400.

Subsequently, the district court's judgment was vacated by the Fourth Circuit with instructions to dismiss for lack of subject matter jurisdiction. *Champion Int'l Corp. v. EPA*, 850 F.2d 182 (4th Cir.1988). The circuit court prefaced and postscripted its decision by expressing its general agreement with "much of the district court's opinion." 850 F.2d at 183, 190. It also stated that "EPA's act in assuming the permit issuing authority was consistent with statute and regulation, and the objections it made to the North Carolina permit do not seem to be out of bounds." *Id.* at 187. However, the appellate court ultimately concluded:

> The actions of EPA . . . at this stage of the NPDES proceeding are not now subject to judicial review. EPA has neither granted nor denied a permit, so such action is not yet reviewable under [33 U.S.C.] § 1369(b)(1). The nature of EPA's objections are well within the contemplation of those it is entitled to make under applicable regulations. 40 C.F.R. § 123.44(c). Whatever may be the result should EPA make an objection completely without its delegated authority, so as to subject that action to present judicial review under *Leedom v. Kyne*, [358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958)], we have no occasion to consider, for such objections have not been made here.

850 F.2d at 190. The court stated that the district court "properly retained jurisdiction of the case in order to ascertain whether or not

> The CWA requires an NPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards. . . . The meaning of [33 U.S.C. § 1311(b)(1)(C)] is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility. . . .
>
> . . . In this case, the permit should be upheld if the record shows by a preponderance of the evidence that the authorized discharge would not cause an actual *detectable* violation of Oklahoma's water quality standards.

Order on Petitions for Review, R., A-28, at 11-13. The CJO explained that in an interstate dispute the "only applicable water quality standards are those that have been approved by EPA under the CWA." Order on Petitions for Review at 11 n. 13 (citing *Illinois v. City of Milwaukee*, 731 F.2d 403, 413-14 (7th Cir.1984), *cert. denied*, 469 U.S. 1196, 105 S.Ct. 979, 980, 83 L.Ed.2d 981 (1985)). In noninterstate disputes, however, "the source state may impose more stringent non-EPA-approved water quality standards in NPDES permits under 33 U.S.C.A. § 1370." Order on Petitions for Review at 12 n. 13.

EPA acted within its delegated authority," and agreed with the district court's decision that EPA was so acting. But it held that, once the district court made that determination, it should have dismissed for want of subject matter jurisdiction and not reached the merits. *Id. Champion's* holding is limited to the narrow determination that EPA had not acted "clearly beyond the boundaries of its authority." *Id.* at 186. Indeed, the court added: "Even if EPA may ultimately be shown to be incorrect in its objections to North Carolina's permit (and we do not intimate that they are), its acts are not so clearly outside its authority to subject them to immediate judicial review. . . ." *Id.* at 187. Thus, *Champion* does not decide the merits of the question we face, i.e., whether the CWA requires that an NPDES permit ensure compliance with an effected downstream state's water quality standards.

One other case deserves brief mention here. In *Montgomery Envtl. Coalition*, the D.C. Circuit stated: "A state whose water quality will be affected by the issuance of a permit for discharge in another state may block that permit until conditions are imposed insuring compliance with applicable water quality requirements of the objecting state." 646 F.2d at 594 n. 21. But in the next breath the court acknowledged this was not an issue in *Montgomery*; thus, the language is dictum.

On remand, the ALJ expressed similar views:

> It is clear that an out-of-state source must meet the W.Q.S. of another downriver state. See § 401(a)(2) of the CWA [33 U.S.C. § 1341(a)(2)]; 40 C.F.R. §§ 122.4(D) and 122.44(d)(4); *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987). Therefore the Fayetteville discharge must meet Oklahoma's W.Q.S. as they exist at the border of the two states. . . .
>
> . . . To accept [the Arkansas parties' argument that the beneficial use limitations do not apply to Fayetteville] would violate the principals [sic] set out above since it is premised on the notion that such standards only apply to sources located in the State of Oklahoma. There is no factual issue among the parties that the Illinois River at the border of the two states is a Class (A) River and therefore the standards applicable to pollution crossing that border must comply with Oklahoma's W.Q.S. as they exist at that point. Any other interpretation would allow a source to locate its discharge just across the line in Arkansas and freely violate Oklahoma standards. Such a result is contrary to the [Clean Water Act], regulations and Court decisions.

Decision on Remand, R., A-33, at 4-5. The ALJ's interpretations of Oklahoma's WQS, including the Beneficial Use Limitations, were ultimately affirmed by the CJO. The CJO also reiterated the mandate of his first order—

that " 'the permit should be upheld if . . . the authorized discharges would not cause . . . [a] violation of Oklahoma's water quality standards,' "—and accepted the ALJ's conclusion that no violation would occur. Second Order on Petitions for Review, R., A-37, at 7-8.

The Arkansas parties contend we need look no further than the Clean Water Act to decide this issue because "Congress has clearly manifested its intent [in the CWA] that affected states cannot impose their water quality standards upon dischargers in other states." Arkansas Brief at 42; *see id.* at 33-40. Alternatively, if we decide congressional intent is ambiguous, they urge us to reject EPA's interpretation as unreasonable. *Id.* at 42. EPA also claims the CWA is "clear that the terms of an NPDES permit must include compliance with state water quality standards—regardless of the source of a discharge." EPA Brief at 15-16. Therefore, EPA maintains, resort to the legislative history—which EPA contends corroborates EPA's interpretation—is unnecessary. *Id.* at 20 (citing *United States v. Oregon*, 366 U.S. 643, 648, 81 S.Ct. 1278, 1280-81, 6 L.Ed.2d 575 (1961)). In the event we conclude congressional intent is ambiguous, EPA alternatively defends the reasonableness of its interpretation of the CWA and argues that, under *Chevron*, 467 U.S. at 844-45, 104 S.Ct. at 2782-83, it must therefore be upheld. EPA Brief at 13, 15.

We do not find the Clean Water Act, on its face, quite as clear a manifestation of congressional intent on this issue as any of the parties suggests. Significantly, however, EPA's interpretation is not one the agency adopted only, or in the first instance, in the context of this permit proceeding. Rather, EPA's position herein is consistent with its CWA-implementing regulations. For example, 40 C.F.R. § 122.4(d) expressly provides: "No permit may be issued: . . . (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of *all affected States*." (Emphasis

added.) Concomitantly, EPA's rules require permits to include, where applicable, "any requirements . . . necessary to . . . [c]onform to applicable water quality requirements . . . when the discharge affects a state other than the certifying State [i.e., the state in which the discharge will be located]." § 122.44(d)(4). *See also* 40 C.F.R. § 131.10(b) (state "shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters"). We accord deference to the consistent interpretation of a statute by the agency entrusted with its administration. *See* 33 U.S.C. § 1251(d); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44, 70 L.Ed.2d 23 (1981); *cf. E.I. DuPont De Nemours & Co. v. Train*, 430 U.S. 112, 135 n. 25, 97 S.Ct. 965, 978 n. 25, 51 L.Ed.2d 204 (1977) (EPA interpretation entitled to deference, even if not contemporaneous with enactment of CWA, in light of technical nature of statute, agency's expertise, and ambiguous statutory language). After considering the Act as a whole and its legislative history, we conclude EPA's interpretation is reasonable and consistent with Congress's purposes in enacting the CWA.

2. The Parties' Statutory Arguments

In defending its construction of the CWA the EPA relies principally on § 301(b)(1)(C) of the Act, 33 U.S.C. § 1311(b)(1)(C), which provides:

> In order to carry out the objective of this chapter [i.e., to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251] there shall be achieved . . . not later than July 1, 1977, *any more stringent limitation, including those necessary to meet water quality standards*, . . . established pursuant to *any* State law or regulations (under authority preserved by section 1370 of this title) . . . or required to implement *any*

applicable water quality standard established pursuant to this chapter.

(Emphasis added.) Section 402(a)(2) and (b)(1)(A) of the CWA, 33 U.S.C. § 1342(a)(2), (b)(1)(A), in turn mandates that any NPDES permit issued under the Act contain terms adequate to insure compliance with § 301 above. *See* EPA Brief at 16.

EPA rejects Arkansas's argument that these sections are "mere timing provisions." *Id.* (citing Arkansas Brief at 34-35). On the contrary, EPA argues, these sections establish fundamental requirements of the Act. Moreover, EPA contends that Congress, by making no distinction between the water quality standards of source and affected states in these requirements, "indicated the uniform applicability of such standards." EPA Brief at 16-17.[7]

Arkansas counters that § 1311 does not explain whether the "more stringent limitations" must be achieved by dischargers in other states, but that section

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[7] Under the 1972 CWA amendments, water quality standards are considered "supplementary control measures"—"supplementary" in the sense that they are in addition to point source effluent limitations, the control measure upon which the 1972 CWA Amendments primarily rely to achieve the Act's objective of eliminating pollutant discharges into navigable waters by 1985. *State Water Resources Control Bd.*, 426 U.S. at 203-05 & n. 12, 96 S.Ct. at 2024-25 & n. 12 ("[w]ater quality standards are retained as a supplementary basis for effluent limitations . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels"). *See* 33 U.S.C. §§ 1251(a)(1), 1311(b)(1)(A); *see also* S.Rep. No. 414, *reprinted in* 1972 U.S.Code Cong. & Admin.News 3668, 3675 ("Under this Act the basis of pollution prevention and elimination will be . . . effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement."). That WQS are "supplementary" in the scheme of the Clean Water Act is, however, irrelevant to the question of their applicability across state lines.

510, 33 U.S.C. § 1370 limits the "reach" of any stricter standards to discharges originating within the state imposing those standards. Arkansas Brief at 35.[8] This argument relies largely on language in § 1370 preserving "any right or jurisdiction of the States with respect to the waters . . . of such States." The argument suffers from at least three flaws, however.

First, § 1370 is a savings clause that merely preserves the preexisting right of the states "to set more restrictive standards than those imposed by [the CWA]." S.Rep. No. 414, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3751. *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 493, 107 S.Ct. 805, 812, 93 L.Ed.2d 883 (1987) (§ 1370 savings clause "preserves the authority of a State," but "does not preclude preemption" of state law); *Milwaukee v. Illinois*, 451 U.S. 304, 327-28, 101 S.Ct. 1784, 1797-98, 68 L.Ed.2d 114 (1981). Accordingly, there is no basis for believing that Congress intended § 1370 to limit or define the scope of one of the CWA's crucial provisions. The cases Arkansas

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[8] 33 U.S.C. § 1370 provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or liimtation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

cites to the contrary are unavailing for that purpose. *See* Arkansas Brief at 35-36 n. 28.

Second, the "waters . . . of such States" language, which Arkansas deems significant, occurs in and applies only to the second of two principal provisions of § 1370. That provision (subparagraph (2)) refers broadly to "any right or jurisdiction of the States." In contrast, the first provision (subparagraph (1)) specifically addresses the rights of states and their subdivisions to regulate pollution. Subparagraph (1) says nothing about the boundaries within which such rights may be exercised. Thus, "waters . . . of such states" cannot be construed as a limitation on the rights to regulate pollution preserved in the first part of this section.[9]

Third, thoughtful consideration of the language of § 1311(b)(1)(C)—

> there *shall be achieved* . . . any more stringent limitation, including those *necessary to meet* water quality standards . . . established pursuant to any State law or regulations . . . or *required to implement* any applicable water quality standard established pursuant to this chapter

(emphasis added)—exposes the irrationality of Arkansas's argument. In order to ensure that the EPA-approved water quality standards in all states are "met" or "implemented," it *is* "necessary" to require dischargers to

[9] We do not suggest one state may directly regulate the conduct of a discharger in another state. Such exercise of jurisdiction would exceed traditional bounds of sovereignty. Nor does the Act redefine those bounds to allow dual permitting. *See Ouellette*, 479 U.S. at 491, 107 S.Ct. at 811. But the question posed here is whether *federal* law embodied in the Clean Water Act requires a discharge permit to ensure compliance with the applicable WQS of all affected states. Traditional concepts of state powers and the § 1370 savings clause cannot provide the answer to that question. We must look to the CWA as a whole.

meet the applicable requirements of other affected states as well as those of the source state. There could be no assurance of achieving a state's more stringent WQS if an upstream, out-of-state discharger were not required to comply with those standards.

EPA concludes and we agree that Arkansas's construction of the Act would make achieving downstream water quality standards "impossible in many circumstances or . . . possible . . . only by imposing a disproportionate burden on dischargers located in the downstream state." EPA Brief at 21.[10] Moreover, rewarding sources for locating in states with less stringent water quality requirements (by relieving them from complying with more stringent downstream WQS) would also result in "pollution shopping," contrary to Congress's intent in passing the 1972 CWA amendments.[11]

Arkansas counters that EPA's construction of the Act would have "chaotic" consequences because any downstream state could impose its requirements on proposed sources in any upstream state. Arkansas Brief at 46-

[10] The agency contends that its regulations and the legislative history manifest an intent to distribute the burden of meeting water quality standards among all discharges on and affecting a particlular waterway. *See* EPA Brief at 22 & n. 19.

[11] In its bill amending section 402 of the Act in 1977 to authorize EPA to issue an NPDES permit where it determines a state-issued permit is inadequate, the Senate committee stated: "EPA has been much too hesitant to take any actions where States have approved permit programs. The result might well be the creation of 'pollution havens' in some of those States which have approved permit programs. This result is exactly what the 1972 amendments were designed to avoid." S.Rep. No. 370, 95th Cong. 1st Sess. at 73, *reprinted in* 1977 U.S.Code Cong. & Admin.News 4326, 4398.

EPA argues reasonably that Arkansas's interpretation would encourage sources to locate in states with less stringent water quality requirements. A source located immediately above a state boundary would not be required to meet the more stringent requirements, if any, of the downstream state, even though that state may be most affected by the discharge.

47. Thus, Arkansas hypothesizes, a permit authorizing a discharge to the Mississippi River in Minnesota would be subject to challenge based on the water quality standards of each of the nine downstream states. *Id.* at 46 (citing *Ouellette*, 479 U.S. at 496 n. 17, 107 S.Ct. at 814 n. 17). Arkansas's purported concern is that this would undercut the CWA's "orderly regulatory scheme," making it " 'virtually impossible to predict the standard for a lawful discharge into an interstate body of water.' " Arkansas Brief at 47 (quoting *Illinois v. Milwaukee*, 731 F.2d at 414).

We find little practical merit in Arkansas's agreement. The ability, as well as the authority, to require compliance with the WQS of downstream states is necessarily limited by the ability to measure a source's impact on the water quality of the receiving waters. At some point downstream, the impact on water quality of a particular pollution source becomes so attenuated as to be undetectable. Assuming the quality of the receiving waters currently meets or exceeds standards, there can be no violation of standards if the impact of the proposed source on the water quality could not be measured.[12] Nor is it "impossible to predict the standard[s]" applicable to a new discharge, as Arkansas claims. First, EPA approval of state WQS determines the potentially applicable rules. Furthermore, the permitting system established in the 1972 and 1977 amendments to the CWA clearly provides for consultation with and input by states that may be affected. Finally, computer modeling (such as that performed for the Fayetteville plant) can predict the extent of a new source's potential impact, thus demonstrating which states' WQS must be met.

[12] See part III.B. of this opinion for a discussion of the significance in the permitting context of preexisting WQS violations.

3. *Illinois v. Milwaukee* and *Ouellette*

Arkansas cites *International Paper Co. v. Ouellette* and *Illinois v. Milwaukee* in support of its statutory construction argument, but that reliance is misplaced. In each of those cases an affected state was seeking to enjoin an ongoing discharge in another state by resort to its own state law nuisance remedies. 479 U.S. at 483, 107 S.Ct. at 807; 731 F.2d at 404. In contrast, this case is a permitting, rather than an enforcement, action wherein Oklahoma seeks to ensure compliance with federal law, i.e., its EPA-approved WQS. The Seventh Circuit in *Illinois v. Milwaukee* recognized this distinction when it pointed out that

> Illinois' basic grievance is that the permits issued to Milwaukee pursuant to the [CWA] do not impose stringent enough controls on the discharges. Nevertheless, Illinois failed to participate in the permit issuing process when the Milwaukee permits were issued. . . . [T]hat process seems now to be the appropriate federal forum for adjusting the competing claims of states in the environmental quality of interstate waters.

731 F.2d at 412-13 n. 5. The court found that Illinois had "not sought to enforce an effluent limitation under Wisconsin [law] nor sought to enforce federal limitations as provided for under the 1972 [CWA]" and concluded that the CWA "preclude[s] the type of application of state law sought by Illinois." 731 F.2d at 414.

The Supreme Court's decision in *Ouellette* is somewhat more problematic, even though, like *Illinois v. Milwaukee*, it is not factually or procedurally similar to this case. The specific issue in *Ouellette* was whether the CWA preempted a common law nuisance suit filed in a Vermont court under Vermont law against a New York discharger, which was the source of the alleged injury in Vermont. The Court concluded that "Vermont nuisance

law is applicable to a New York point source," 479 U.S. at 497, 107 S.Ct. at 814; however, it chose to express its holding more broadly. The Court stated: "We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located," *id.* at 487, 107 S.Ct. at 809, and "we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source," *id.* at 494, 107 S.Ct. at 813. The *Ouellette* Court's discussion of the CWA includes statements that Arkansas concedes "may be dicta." Arkansas Reply Brief at 18. But it is these statements concerning the regulatory framework of the CWA and the relative roles of source and affected states which Arkansas embraces. In particular, Arkansas asks us to give weight to the following discussion:

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. . . . Significantly, however, an affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters.

Ouellette, 479 U.S. at 490-91, 107 S.Ct. at 810-11, *quoted in* Arkansas Brief at 41.

While we agree these statements seem to undercut EPA's position, it is beyond dispute that they are dicta and not controlling here. *Ouellette* was an enforcement

action in which the issue was the availability of a nuisance remedy under the common law of an affected state against an out-of-state discharger. Even the Court's broadly stated holdings were expressed in terms of "a *state-law* claim concerning interstate water pollution," 479 U.S. at 487, 107 S.Ct. at 809 (emphasis added), and "applying the *law of an affected State*," *id.* at 494, 107 S.Ct. at 813 (emphasis added). In contrast, the case before us poses the question of the applicability of the *federally* approved water quality standards of an affected downstream state in permitting a discharge in an upstream state.[13]

Moreover, *Ouellette* contains other dicta that mitigate the apparent impact of the language quoted above. For instance, the Court noted that nothing in its decision affected the plaintiffs' right to "pursue remedies that may be provided by the Act." 479 U.S. at 498 n. 18, 107 S.Ct. at 814-15 n. 18. The Court pointed out, as examples, that the plaintiffs had the opportunity to protect their interests *before* permit issuance by commenting on and objecting to the proposed permit conditions, and that they still were entitled to bring a citizen suit to compel compliance with the permit. *Id.*

Ouellette also suggested that what the plaintiffs there sought to do was akin to establishing a second permit system, which the Court held is disallowed by 33 U.S.C. § 1342(b). *See id.* at 491, 496-97, 107 S.Ct. at 811, 814. That § 1342(b) limits a state's permitissuing authority to "discharges . . . within its jurisdiction" is beyond dispute. But this provision must not be construed to imply anything concerning the applicability of an affected state's EPA-approved WQS to the process of permitting a dis-

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[13] Both EPA judicial officers here referred to this distinction in discussing what water quality standards are "applicable" or "enforceable" for purposes of NPDES permitting. Order Denying Review, R., A-3, at 7; Order on Petitions for Review, R., A-28, at 11-12 n. 13.

charge in an upstream state. The Act contains several provisions for considering and protecting the water quality of downstream states (including provisions authorizing the actions taken by EPA here). Those provisions are not inconsistent with the Act's implicit prohibition of dual permitting systems. Indeed, if properly implemented, they negate any need for separate permits issued by source and affected states.

The Court's opinion in *Ouellette* corroborates this reasoning. As the Court observed:

> Nothing in the Act gives each affected State this power to regulate discharges. The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution. It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.

479 U.S. at 497, 107 S.Ct. at 814. Plainly, *Ouellette* was concerned not with the CWA's provisions for incorporating a downstream's water quality criteria in the permitting process, but with preventing a downstream state from circumventing or superseding that process by imposing on an already-permitted source additional requirements based on its own state law. So viewed, *Ouellette* is entirely consistent with EPA's interpretation of the applicability of Oklahoma's WQS. *Cf. Champion*, 652 F. Supp. at 1400 (concluding that nothing in *Ouellette* required a modification of the decision of 648 F.Supp. 1390 that a North Carolina discharge permit must require compliance with an applicable Tennessee WQS).

4. The Statutory and Regulatory Framework

The erroneous interpretation of *Ouellette*, which Arkansas advocates, runs aground when the Clean Water Act is considered as a whole. The Act contains several mechanisms for ensuring that minimum water quality and pollution criteria will apply to all navigable waters of the United States; for example, prohibiting the discharge of pollutants except pursuant to a permit, 33 U.S.C. §§ 1311, 1342; requiring EPA to establish effluent limitations for point source discharges; §§ 1311-1312; providing for EPA's approval of water quality standards, § 1313, and state permit programs, § 1342(b); and establishing minimum procedural requirements for state permit programs, § 1314(i). As discussed above, however, states are not precluded from imposing pollution limitations more stringent than those promulgated by EPA. 33 U.S.C. § 1370; 40 C.F.R. § 122.1(f); *Milwaukee v. Illinois*, 451 U.S. at 327-28, 101 S.Ct. at 1797-98. Moreover, the CWA requires the application of best available control technology or best practicable treatment to discharges of pollutants, 33 U.S.C. § 1311, and the Act's legislative history reveals that Congress intended the CWA to be "technology-forcing." S.Rep. No. 414, *reprinted in* 1972 U.S.Code Cong. & Admin.News 3668, 3709 (Act contains a "mandate to press technology and economics" to achieve practicable and attainable levels of effluent reduction; thus, "increasingly tougher controls on industry" will be required); *see also Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 123-24 (D.C.Cir. 1987). Any standard or limitation adopted by a state and approved by EPA becomes the "water quality standard for the applicable waters of that State," and thus is federally enforceable. 33 U.S.C. § 1313(c)(3). *See also* §§ 1319, 1342; S.Rep. 414, *reprinted in* 1972 U.S.Code Cong. & Admin.News 3668, 3672; Order on Petitions for Review, R., A-28, at 11-12 n. 13.

a. *33 U.S.C. § 1341*

EPA finds support for its action here in certain of the foregoing sections. In addition, we consider 33 U.S.C. § 1341 particularly persuasive. It provides that no NPDES permit may be granted until a "certification" is obtained from the state in which the discharge originates (or from EPA where no state agency possesses such authority, § 1341(a)(1); 40 C.F.R. § 121.21(b)), stating that the discharge will comply with, among other things, § 1311 water quality requirements. Section 1341(a)(2) provides:

> Whenever such a discharge may affect, as determined by the [EPA] Administrator, the quality of the waters of any other State, the Administrator . . . shall so notify such other State. . . . If . . . such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and . . . notifies the Administrator . . . and requests a public hearing . . ., the licensing or permitting agency shall hold such a hearing. . . . [The licensing or permitting] agency, based upon the recommendations of such State, . . . shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

"'[T]he purpose of [§ 1341(a)(2)] notice requirement is to enable a state whose water quality may be affected by the proposed federal activity an opportunity to insure that its standards *will be complied with.*'" EPA Brief at 17-18 (emphasis added) (quoting *Lake Erie Alliance for the Protection of the Coastal Corridor v. U.S. Army Corps of Eng'rs*, 526 F.Supp. 1063, 1075 (W.D.Pa.1981), *aff'd without opinion*, 707 F.2d 1392 (3d Cir.), *cert. denied*, 464 U.S. 915, 104 S.Ct. 277, 78 L.Ed.2d 257 (1983)).

EPA's regulations reaffirm this view, *see* 40 C.F.R. §§ 121.1-.30,[14] as does the limited case law, *see, e.g., United States v. Commonwealth of Puerto Rico*, 721 F.2d 832, 833-34 (1st Cir. 1983) (certification is a "condition precedent to the EPA's issuance of a NPDES permit"; "state decision denying certification, or one imposing conditions or restrictions, is not reviewable administratively by the EPA" and is "exempt from review in federal court").

Arkansas disputes that "applicable water quality requirements" in § 1341(a)(2) refers to the WQS of the affected state.[15] Based on its plain language, however, we agree with EPA that the purpose of this provision must be to enable affected states to ensure that their water quality will not be jeopardized by a discharge in another state. Only a strained interpretation of the statute could produce the result Arkansas seeks—that "applicable water quality requirements" refers to the WQS of only the source state. Moreover, there would be no reason for § (a)(2) to refer to the effect on the quality of the affected state's waters in terms of "violat[ing] any water quality requirement in such State" if the affected state's water quality requirements were irrelevant in the permitting process. Given that this subsection of the statute deals expressly with effects on states other than the source state, it is much more likely that "applicable" refers simply to those federally approved water quality requirements of affected states that would be violated if the permit were not appropriately conditioned. We reject Arkansas's argument to the contrary.

The legislative history of the certification statute sheds additional light on this matter. In 1977 Congress amended the statute

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[14] Subpart B of these rules deals specifically with determining the effect of proposed discharges on other states.

[15] Arkansas refers erroneously to the section as 33 U.S.C. § 1342(a)(1). Arkansas Brief at 34 n. 27.

> to add section 303 [33 U.S.C. § 1313, "water quality standards and implementation plans"] to the list of the act's provisions for which a State must certify compliance . . . . This means that a federally licensed or permitted activity, including a discharge permit under section 402, must be certified to comply with State water quality standards adopted under section 303.

S.Rep. No. 370, at 72, *reprinted in* 1977 U.S.Code Cong. & Admin.News 4326, 4397; H.Conf.Rep. No. 830, at 96, *reprinted in* 1977 U.S.Code Cong. & Admin.News 4424 4471.[16] According to the committees, the amendment was not meant to change the law but to follow and clarify the original congressional intent that "State water quality standards would be imposed through Section 301, and thus certification by the State would include consideration of water quality standards." 1977 U.S.Code Cong. & Admin. News at 4397. The conference committee added that "[s]ection 303 is always included by reference where section 301 is listed." H.Conf.Rep. No. 830, at 96, *reprinted in* 1977 U.S.Code Cong. & Admin.News 4424, 4471. The Senate committee offered this further explanation of the amendment:

> [A]ll States have approved water quality standards. Thus, it is reasonable to require that Federal permits and licenses should take into account State water quality plans, standards and requirements adopted under section 303 to assure maintenance of water quality in the respective States.

Id. at 4398. Neither the statute as amended nor the committee reports concerning the bills distinguish between source and affected states. Thus, EPA's view that sources subject to NPDES permits must comply with all approved state water quality standards is a reasonable interpretation in light of this history.

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[16] *See supra* note 5 for a brief discussion of § 303 of the CWA, 33 U.S.C. § 1313.

b. *33 U.S.C. § 1342*

Also germane to EPA's construction of the CWA is the fact that, in those states authorized to issue NPDES permits, the EPA Administrator retains authority to veto any proposed permit if he objects to its issuance. 33 U.S.C. § 1342(d)(2).[17] EPA may object on the basis of either of two grounds: (1) that a permitting state failed to accept recomendations from another state whose waters may be affected by permit issuance; or (2) that the permit is " 'outside [i.e., inconsistent with] the guidelines and requirements' of the Act." EPA Brief at 18-19 (quoting 33 U.S.C. § 1342(d)(2)).[18] The statute mandates that "[n]o permit shall issue" if EPA objects for either reason. § 1342(d)(2). If the source state does not revise the proposed permit to satisfy EPA's objection, EPA may issue a discharge permit, § 1342(d)(4), but it may not issue a permit less stringent than that required by any state's effluent limitations and water quality criteria. H.R.Conf.Rep. No. 830, 95th Cong., 1st Sess., 97, *reprinted in* 1977 U.S. Code Cong. & Admin.News 4424, 4472. Given that a permit program administered by EPA is subject to the same requirements as apply to an approved state program, § 1342(a)(3), no reasonable argument would justify invalidating a state-issued permit that fails to account for the WQS of another state, yet allowing EPA to issue a permit objectionable on the same ground.[19]

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[17] EPA may also withdraw approval of a state permit program if EPA determines the state is not administering its program in accordance with CWA requisites. 33 U.S.C. § 1342(c)(3).

[18] EPA's regulations elaborate on these two grounds, enumerating seven possible bases for an EPA objection to a state-issued permit. 40 C.F.R. § 123.44(c).

[19] Section 1342(d)(3), the paragraph immediately following the veto provision, states: "The [EPA] Administrator may, as to any permit application, waive paragraph (2) of this subsection." The discretionary language of this paragraph initially gave us pause, especially in light of the mandatory tone of paragraph (2) ("No

Although several of the CWA terms discussed in the foregoing paragraphs have no direct application to the permit in this case (because EPA, not Arkansas, is the permitting agency), they reflect the objectives and policies behind the Act and the statutory framework established for implementing them. Because nothing in the Act suggests that permits issued by states are subject to more stringent requirements than those issued by EPA—indeed, § 1342(a)(3) mandates that permits issued by EPA and the states "shall be subject to the same terms, conditions and requirements"—any term of the Act directed to state permitting agencies is instructive as to EPA's permitting responsibilities and authority as well.

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permit shall issue" if the Administrator objects). After careful study of the statute and the legislative history, however, we believe the legislative history reveals that EPA's discretion arises only with respect to its authority to choose to review or not review a permit application of which it is notified by a permit-issuing state pursuant to § 1342(d)(1). *See Mianus River Preservation Comm. v. Administrator, EPA*, 541 F.2d 899, 907-09 (2d Cir.1976) (discussing legislative history of § 402 of the CWA). Such discretion is consistent with congressional intent to allow EPA-approved, qualified states to administer their own permit programs. An implicit component of this discretion, once exercised, is EPA's authority to determine the impact of a proposed discharge and whether that impact is acceptable under the CWA.

Once EPA chooses to review a permit application and proposed permit under this section, we do not believe it has "discretion" to overlook any violation of the CWA revealed by its review. *Cf.* § 1342(c)(3) (if EPA determines a state permit program is not being administered in accordance wtih § 1342, it *"shall* withdraw approval of such program" (emphasis added)); § 1313(c)(4) (EPA *"shall* promulgate" new or revised WQS where necessary to meet CWA requirements or where state has promulgated inadequate standard); *contra Mianus River*, 541 F.2d at 909 & n. 24. Interpreting § 1342(d)(3) otherwise (i.e., as making *all* of the provisions of § 1342(d)(2) discretionary) is inconsistent with the spirit and framework of the CWA and with the express prohibition against discharging any pollutant except in compliance with the Act. 33 U.S.C. § 1311(a).

The Arkansas parties construct a similar argument (based on the relation between EPA's and the states' permitting responsibilities) to urge an opposite result, however. They contend:

> Section 1342(b)(5) very clearly indicates that an affected state can only be an advisor to the source state in the permitting process when that process has been delegated to a state to administer. . . . Thus, it makes little sense to suggest . . . that a source state discharger must comply with affected state water quality standards when the permitting authority is the EPA rather than a delegated state.

Arkansas Brief at 38-39.[20] Arkansas correctly suggests it would make "little sense" if the applicability of a downstream state's water quality standards depended on what entity (EPA or the source state) issues the permit. However, Arkansas's argument that affected states are limited to an advisory role contains several fatal flaws.

First, in arguing, in effect, "an affected state may not require a source state to comply with the former's WQS; therefore, EPA may not require such compliance," Arkansas's fundamental premise is faulty. The fact that an affected state may have only an "advisory role" under § 1342(b)(5) does not mean compliance with that state's approved water quality standards is discretionary. More-

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[20] Section 1342(b)(5) provides:

> The Administrator shall approve each such submitted [permit] program unless he determines that adequate authority does not exist . . . [t]o insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing[.]

over, § 1342(b)(5) merely describes part of the procedures a state permit program must provide for insuring communications among the source state, an affected state, and EPA concerning the permitting of a new discharge in the source (permitting) state. *See also* § (b)(3)-(4). Standing alone, the subsection says nothing about whether compliance with affected states' WQS is optional or obligatory.

Second, Arkansas's argument focuses on one paragraph in isolation, rather than in the context of the entire Act, or even in the context of § 1342 as a whole. Section 1342(b) provides that the EPA Administrator shall approve any program submitted by a state desiring to administer its own permit program unless he determines, essentially, that the state proposal does not ensure adequate authority to administer the NPDES permit program properly. Subsection (b)(5), upon which Arkansas relies, is only one of nine specific grounds upon which EPA may refuse permitting authority to a state. § 1342(b)(1)-(9). Subsection (b)(1)(A), for example, requires adequate state authority to "issue permits which apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title."[21] § 1342(b)(1)(A).

Arkansas's argument also overlooks the fact that § 1342(b)(5) derives from § 1341, the certification statute. As discussed earlier in this opinion, § 1341 not only provides for notice to potentially affected states, it requires that permits be conditioned so as to insure compliance with all applicable water quality requirements, and it prohibits issuing any permit that cannot insure such compliance. § 1341(a)(2).

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[21] As EPA argues and we have already discussed, the requirement of compliance with state water quality standards arises from § 1311. Thus, via § 1342(b)(1)(A)'s requirement of compliance with § 1311, permits issued by states must ensure compliance with all applicable WQS.

Finally, Arkansas's argument must fail in the face of other CWA provisions heretofore discussed—in particular, EPA's authority to veto permits and to suspend state programs if they do not meet the requirements of the Act, § 1342(c)-(d), and the proviso that state and EPA permit programs be subject to the same terms and conditions, § 1342(a)(3).

c. *EPA's "Upset" Regulation*

We find still further support for EPA's construction of the CWA in the views the agency expressed in an earlier rulemaking proceeding. In the course of promulgating final regulations providing dischargers with a defense to violating effluent limits during unavoidable source "upset" conditions, EPA stated that "the CWA requires strict compliance with water quality standards"; thus, "water quality standards are . . . legally required to be met at all times." 49 Fed.Reg. 37,998, 38,038 (1984), *quoted in Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1489 (9th Cir.1987), *judgment vacated*, 485 U.S. 931, 108 S.Ct. 1102, 99 L.Ed.2d 264 (1988); *see* 40 C.F.R. §§ 122.41(n), -.4(d).

The final "upset" rule provides that in certain narrowly defined circumstances technology-based effluent limitations may be exceeded (i.e., failure of pollution controls may be allowed). 40 C.F.R. § 122.41(n). Significantly, an industry-proposed defense for violation of water quality-based permit limits[22] was deleted in the final rule. EPA reasoned that, because water quality standards must be met at all times, even during "upset" conditions, "permittees would need to do continuous monitoring on *all stream segments that may be affected*" to ensure that water quality standards were not violated in order to establish the defense. 49 Fed.Reg. at 38,038

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[22] In other words, industry proposed an "upset" defense for exceeding water quality-based effluent limitations, so long as the actual quality of the receiving waters did not fall below established WQS.

(emphasis added). The impracticality of such a requirement led EPA to reject the industry proposal. 49 Fed. Reg. at 38,038. *Id.*[23]

This view that *all* potentially affected stream segments would have to be monitored reflects EPA's conviction that an upstream source whose effluent might affect the water quality of downstream states must comply with the WQS of those states. It is also consistent with EPA's belief that "strict compliance" with water quality standards is required by the CWA, because such compliance would be impossible if sources could disregard the WQS of states other than the source state.

According to EPA, the requirement of strict compliance with WQS derives from 33 U.S.C. § 1311(b)(1)(C), which mandates that "there shall be achieved . . . not later than July 1, 1977, any more stringent limitation . . . necessary to meet water quality standards." (Recall that all NPDES permits must ensure compliance with § 1311. § 1342(a)(1), (b)(1).) The legislative history of the section bears out EPA's interpretation. *See* S.Rep. No. 414, *reprinted in* 1972 U.S.Code Cong. & Admin.News 3668, 3710 (EPA "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability"). Even in 1977 when Congress "relaxed" the best available technology requirements in certain circumstances, the amended statute and the legislative history leave no doubt that water quality standards still must be maintained.[24]

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[23] EPA has held this view consistently since at least 1979. 44 Fed.Reg. 32,854, 32,863 (1979) ("violations of . . . water quality based effluent limitations are not subject to a defense of upset"); *see also Student Pub. Interest Research Group v. P.D. Oil & Chem. Storage, Inc.*, 627 F.Supp. 1074, 1086 (D.N.J.1986); *Union Oil*, 813 F.2d at 1489.

[24] The 1977 amendments added a "waiver" provision in section 301 of the Act (33 U.S.C. § 1311(g)) allowing for use of "best practicable technology" instead of "best available technology" if 1983 water quality standards could be met thereby. The Senate committee explained that this allowance was being made to avoid "[effluent] treatment for the sake of treatment." S.Rep. No. 370, 95th Cong., 1st Sess. at 43-44, *reprinted in* 1977 U.S.Code Cong. & Admin.News 4326, 4368. To qualify for the waiver, the amended statute requires compliance with certain conditions, including attainment or maintenance of a high standard of water quality.

In explaining the amendment the Senate committee cautioned:

> [T]he gains made as a result of the 1977 requirements could evaporate in the middle of the next decade if only the 1977 [effluent limitations] and new source performance standards are applied. Thus, for many riverways . . ., pressure must be maintained to *assure improved water quality and to avoid slipping back.*
>
> . . . .
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> The Committee intends that current effluent limitations . . . should represent a "floor" or minimum requirement of the modifications authorized by this section. Current levels of discharge must not be relaxed by this provision because that would imply additional treatment requirements on other point or nonpoint source dischargers.

Id. at 42, 44, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 4367, 4369 (emphasis added).[25] The Committee

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[25] 33 U.S.C. § 1311(m) provides another example of Congress's willingness to relax statutory effluent limitations as long as compliance with WQS is assured. This statute governs industrial discharges into "deep waters of the territorial seas." Subsection (m)(1) provides for issuing, under certain unique circumstances, permits containing "modified" effluent limitations (i.e., less stringent limits than otherwise required), provided that effluent limitations established in such permits are "sufficient to implement the applicable State water quality standards." § (m)(2). The statute further provides that EPA *may* terminate such a permit if it subsequently determines there has been a "decline in ambient water quality of the receiving waters . . . even if a direct cause and effect relation-

also stated: "There is nothing in these new provisions which in any way preempts the rights of States to have more stringent water quality standards or associated effluent limitations . . . ." *Id.* at 43, U.S.Code Cong. & Admin. News at 4368.

d. *33 U.S.C. § 1365*

One final provision of the CWA deserves mention in our discussion of the statutory interpretation issue. Section 505(h), 33 U.S.C. § 1365(h), authorizes the governor of a state to sue EPA to enforce an effluent standard or limitation under this chapter," the violation of which is occurring in another state and is "causing a violation of any water quality requirement in his state." Subsection (f) defines "effluent limitation or standard under this chapter" as including, for purposes of this section, certification under § 1341 and permits or conditions thereof issued under § 1342.

Clearly, the injury sustained by a state for which § 1365 provides a remedy is the impact on that state's water quality, not the violation of the "effluent standard or limitation" per se. This interpretation is dictated by common sense and congressional intent. *See* S.Rep. No. 414, *reprinted in* 1972 U.S.Code Cong. & Admin.News 3668, 3675 ("[T]he basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance."). Arkansas's view that discharge permits are not required to ensure compliance with the applicable WQS of all affected states cannot be reconciled with § 1365(h)'s express remedy for the violation of "any water quality requirement" in one state, which results

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ship cannot be shown," but that EPA *shall* terminate such a permit if the effluent from the source "*is* contributing to a decline in ambient water quality of the receiving waters." § (m)(4) (emphasis added).

from the violation of an "effluent limitation" (defined to include a permit condition) in another state.

Section 1365 reminds us that, under the CWA, effluent limitations are not an end in themselves, but simply a means to an end—the desired water quality. The plainest evidence of this can be found in 33 U.S.C. § 1311(b)(1)(C) (discussed at pages 604-605 of this opinion) and in § 1312, each of which reveals that the purpose of effluent limitations is to achieve a desired level of water quality. Section 1312, "Water quality related effluent limitations," provides:

> Whenever, in the judgment of the [EPA] Administrator, discharges of pollutants from a point source or a group of point sources, with the application of effluent *limitations required* under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source of sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

33 U.S.C. § 1312(a) (emphasis added). In other words, effluent limits more stringent than those required by 33 U.S.C. § 1311(b)(2) must, if feasible, be established by EPA and imposed on any sources responsible for interfering with the desired water quality in a specific stream segment.[26] In the words of the Senate committee:

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[26] In addition, states are required to identify waters for which the effluent limitations established pursuant to § 1311 are "not stringent enough to implement any water quality standard applicable

> The limitations necessary to achieve a given level of water quality *in one reach of a waterway* may require more control of effluents than that attainable through application of the best available technology. Where that is desirable to implement the policies of the Act, and feasible, [this section] provides the authority to impose controls based on water quality.
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> . . . .
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> The concept of "alternative effluent control strategies" is necessary to account for [certain] difficulties in simply setting more stringent effluent limitations. . . . [F]urther reduction of the level of effluent entering the *affected waters* may not be possible through control technology, yet essential to water quality. Alternative effluent control strategies, such as the transportation of effluents to other less affected waters or the control of in-plant processes would have to be developed.

S.Rep. No. 414, *reprinted in* 1972 U.S.Code Cong. & Admin.News 3668, 3712-13 (emphasis added).

This section and its legislative history reveal the preeminent importance of water quality—actual and desired—in the framework of the CWA. Significantly, they lack evidence of any intent to limit the scope of § 1312 to the *intrastate* water quality effects of discharges. Indeed, the statute's use of the term "specific portion of the navigable waters" (like the Senate report's use of "one reach of a waterway" and "affected waters"), rather than language specifying waters of the source or permitting state, suggests that the section contemplates regulation of water quality without regard to state boundaries. Vesting au-

to such waters," 33 U.S.C. § 1313(d)(1)(A), and to establish the acceptable "total maximum daily load" for pollutants in those waters, § 1313(d)(1)(C). Eventually, the states are required to establish total maximum daily loads for all waters. § 1313(d)(3).

thority in EPA, instead of in individual states, arguably suggests a similar intent.[27]

Considered together, all of the provisions of the CWA discussed above (§§ 1311, 1312, 1313, 1314, 1341, 1342, 1365, and 1370), as well as the legislative history and EPA's implementing regulations, evidence the reasonableness of EPA's interpretation of the Act. Accordingly, we hold that no discharge to a navigable water, such as the Illinois River, may be permitted unless compliance with all applicable water quality requirements, including the federally approved standards of affected downstream states, is assured.

B. *Significance of Existing Violations of Illinois River Water Quality Standards*

There is substantial evidence in the record of ongoing violations of Illinois River water quality standards, yet neither of the EPA judicial officers nor any of the parties addresses whether, or how, this is relevant to Fayetteville's application to discharge to the Illinois River. We believe this situation poses an issue of critical importance—whether a new discharge may be permitted when the applicable water quality standards are already being violated.[28] Guided by the Supreme Court's pronouncement

[27] Section 302 of the conference substitute bill, which was ultimately enacted, was identical to the Senate provision discussed above with one exception: The conference committee eliminated the Senate bill's grant of authority to the states. In the statute as enacted (33 U.S.C. § 1312), authority to impose additional effluent limitations is vested solely in EPA. 1972 U.S.Code Cong. & Admin.News at 3799.

[28] Throughout this and the prior section of our opinion, we use "applicable water quality standards" to refer to those *federally approved* water quality requirements of affected states with which a proposed discharge must comply. *See supra* note 5. In this section, we refine the scope of the term to denote federally approved water quality requirements that are relevant to the physical and chemical makeup of a proposed source's effluent. For example, Oklahoma's nutrients standard is relevant to the Fayetteville plant because the

that an agency decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency," *Motor Vehicle Mfrs.*, 463 U.S. at 43, 103 S.Ct. at 2856, we conclude EPA's decision to issue the Fayetteville permit was arbitrary and capricious. The agency's decision is also flawed by misinterpretation and misapplication of two important Oklahoma water quality regulations and by arbitrary disregard for certain expert testimony. For these reasons, discussed more fully below, we hold that the Clean Water Act prohibits granting an NPDES permit under the circumstances of this case (i.e., where applicable water quality standards have already been violated) and reverse EPA's decision to permit Fayetteville to discharge any part of its effluent to the Illinois River Basin.

1. Law Applicable to Oklahoma Scenic Rivers

The Upper Illinois River, including Lake Frances, from the Arkansas state line down to the 650-foot elevation level of Tenkiller Ferry Reservoir, is designated an Oklahoma state scenic river. Okla.Stat. tit. 82, § 1452(b)(1) (1990). As such, certain water quality standards apply to these waters. *See* Oklahoma Water Quality Standards (OWQS) § 4 & App. A (1982).[29] Water quality standards

plant discharges phosphorus and nitrogen, but the temperature standard is irrelevant because, presumably, any impact that the plant's effluent might have on the temperature of water in the river would be so attenuated at the state line as to be undetectable. For the sake of convenience, we often refer simply to "Oklahoma water quality standards," or "WQS," but in each instance it is implied that those standards have been approved by EPA. We draw no conclusions about state requirements that may not have been approved by EPA.

[29] Water quality standards are promulgated by the Oklahoma Water Resources Board pursuant to Okla.Stat. tit. 82 § 926.3.6. Appendix A of the standards lists the following beneficial uses, *inter alia*, for the Illinois River, including Lake Frances, and Tenkiller Reservoir below the scenic river: "public and private water supply," "fish and wildlife propagation" (primary warm-water fishery), "agriculture" (Class I irrigation), "primary and secondary recreation," "aesthetics," and "smallmouth bass." *See* OWQS § 4 & App. A. Recall that Oklahoma WQS have been approved by EPA. The particular standards applicable to the Fayetteville permit are those adopted in 1982. Second Order on Petitions for Review, R., A-37, at 5-6.

consist of two parts: a designated use or uses for the identified waters and water quality criteria for such waters based on those uses. 40 C.F.R. § 130.2(c); Okla. Stat. tit. 82 § 904(f); OWQS § 4. Of greatest interest for purposes of this discussion are the Illinois River's "fish and wildlife propagation" (primary warmwater fishery), "aesthetics," and "smallmouth bass" designated "beneficial uses." Within the latter two use categories, the following water quality criteria are particularly significant: turbidity (OWQS § 4.10(b)), nutrients (OWQS § 4.10(c)), and dissolved oxygen (OWQS § 4.11(a)). The occurrence of phosphorus and nitrogen in Fayetteville's effluent necessitates the consideration of these criteria.[30]

As a preliminary matter, Oklahoma contends and we agree that EPA's judicial officers erred in concluding that Oklahoma's nutrients standard, § 4.10(c), applies only to lakes, not to streams. Decision on Remand, R., A-33, at 6; Second Order on Petitions for Review, R., A-37, at 8. Section 4.10(c) provides: "The total phosphorus concentration and the nitrogen/phosphorus concentration ratio

[30] In oversimplified terms, phosphorus and nitrogen are nutrients which, when added to an aquatic system, stimulate the growth of aquatic plants and other organisms, eventually altering biological characteristics of the system, such as species populations, biomass, and species abundance and diversity, as well as physical and chemical parameters, such as temperature, turbidity, color, and dissolved oxygen. In part B.2.c. of this discussion, we cite evidence in the record relating to the composition of Fayetteville's effluent and compliance with these criteria.

shall not be increased to levels which result in man-induced eutrophication problems." The source of the agency's confusion is the definition of "eutrophication (natural)" (included in Appendix C of the OWQS), which refers only to lakes.[31] An Oklahoma witness at the administrative hearing explained that the definitions in the appendix are "scientific definitions," provided merely for clarification purposes, and that "the state does apply the eutrophication principle . . . to rivers." Tr. at 578. Apparently no one scrutinized the OWQS carefully enough to discover that the regulations themselves define the scope of the nutrient standard's application. Section 4, "Standards for Water Quality," unequivocally states: "Narrative standards [including] Section . . . 4.10(c) . . .' shall be maintained at all times and *apply to all perennial and intermittent streams.*" (Emphasis added.) In addition, the preface to Appendix A of the OWQS states that § 4.10(c) applies even to those stream segments not listed in the appendix (i.e., stream segments for which beneficial uses have not been designated). Accordingly, we reject EPA's ruling that the nutrients standard applies only to Lake Frances and Tenkiller Reservoir and hold that it applies to the entire reach of the Illinois River in Oklahoma.

In addition to the nutrients standard, Oklahoma's "Anti-Degradation Policy," OWQS § 3, and "Beneficial Use Limitations," *id.* § 5, also protect the Upper Illinois River.[32] The Oklahoma parties assert that EPA also mis-

[31] "Eutrophication (natural)" is defined:

> The normally slow aging process by which a lake evolves into a bog or marsh and ultimately assumes a terrestrial state. During eutrophication the lake becomes so rich in nutritive compounds (especially nitrogen and phosphorus) that algae and other microscopic plant life become superabundant, thereby "choking" the lake, and causing the lake to advance in seral stages.

[32] The text of OWQS §§ 3 and 5 is included as an appendix to this opinion.

interpreted and misapplied these regulations. Their argument is rather unfocused, but they basically claim that "any increase in any 'wastes' . . . which *may pollute or tend to pollute*" the waters of a scenic river violates these rules. Oklahoma Brief at 32 (emphasis in original); *see generally id.* at 30-38.

The Beneficial Use Limitations regulation provides that scenic rivers "are protected by prohibition of any new point source discharge of wastes . . . except under conditions described in Section 3 [the Anti-Degradation Policy]." OWQS § 5. The relevant provision of § 3 states: "No degradation shall be allowed in high quality waters . . . includ[ing] water bodies . . . designated 'Scenic Rivers.'" The Oklahoma courts apparently have not interpreted these provisions.[33] Nevertheless, we believe the

[33] The Oklahoma Attorney General has issued an opinion, however, addressing the question: May the Oklahoma Water Resources Board (OWRB) adopt an antidegradation policy that allows for lower water quality or limited degradation of certain waters? Opinion No. 84-124 (Dec. 28, 1984). The Attorney General acknowledged the federal antidegradation regulation, which provides for lowering water quality in certain limited circumstances, but observed that federal law was meant to set *minimum* standards. He then set forth the Oklahoma Legislature's intent that state waters were to be classified "for the purpose of progressively improving the quality . . . and upgrading them from time to time by reclassifying them," Okla.Stat. tit. 82, § 926.6(A), and that it was state policy to "protect, maintain, and improve the quality [of the waters of the state]," *id.* § 926.2. He concluded:

> It is clearly the intent of the Legislature that the quality of state waters be progressively improved and not be allowed to be degraded. Oklahoma law does not set forth any exceptions.
>
> . . . .
>
> It is, therefore, the official opinion of the Attorney General that . . . the [OWRB] may not adopt a statewide antidegradation policy which allows for lower water quality or limited degradation of certain waters.

Thus, it is the expressed view of the Oklahoma executive department that Oklahoma law does not allow even the limited degradation authorized by the federal regulation. OWQS § 3, however, suggests a contrary position.

plain language of the regulations manifests a clear intent to allow no degradation of the water quality of scenic rivers. More specifically, the regulations disallow any additional discharge of pollution (either a new point source or an increase from an existing source) to a scenic river if its water quality *has been degraded* or if the new source *would degrade* it.

Closer examination of the language and structure of the Anti-Degradation Policy, guided by the minimum requirements for such policies set forth in EPA's regulation, confirms our plain language construction.[34] The Ok-

[34] EPA regulations mandate that all states adopt and implement an antidegradation policy meeting minimum federal requirements. 40 C.F.R. §§ 131.6(d), 131.12. Oklahoma's policy is very similar to the EPA rule; one difference is that Oklahoma specifies scenic rivers for protection from any degradation. *Cf.* § 131.12(3). Both the federal and state rules establish three levels of protection for state waters. Under level 1, existing instream water uses must be maintained and protected in all streams. *Compare* 40 C.F.R. § 131.12(1) *with* OWQS § 3, para. 1. The Oklahoma rule adds that this level of protection prohibits any "further degradation which would interfere with or become injurious to existing instream water uses" and that "Oklahoma's waters . . . shall be . . . improved." Under level 2, "limited degradation" may be allowed in certain "high quality waters" whose "water quality . . . exceeds those levels necessary to support propagation of fish, shellfish, wildlife, and recreation." *Compare* OWQS § 3, para. 2 *with* 40 C.F.R. § 131.12(2). However, the state must first decide, after fully satisfying state planning requirements, that "necessary and justifiable economic or social development" necessitates this degradation. OWQS § 3, para. 2; *cf.* § 131.12(2). Moreover, in allowing such degradation, the state is required to "assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources *and* all cost effective and reasonable best management practices for non-point source control." § 131.12(2) (emphasis added). (The comparable provision in the Oklahoma rule is not as clear, but under EPA regulations, it must be interpreted at least as stringently.) Finally, level 3 provides for maintaining and protecting certain exceptional, high quality waters (which in Oklahoma includes scenic rivers). *Compare* OWQS § 3, para. 3 *with* 40 C.F.R. § 131.12(3). The Oklahoma rule expressly prohibits any degradation of these waters; the prohibition in EPA's regulation is implicit.

lahoma regulation allows "no degradation" of water quality in designated scenic rivers. "Limited degradation" is permitted limited *only* in other "high quality waters" where the existing water quality "exceeds those levels necessary to support propagation of fish, shellfish, wildlife, and recreation." OWQS § 3, para. 2. Even if the Upper Illinois were not a scenic river, it would not be eligible for the limited degradation exception because its waters in their present condition do not qualify as such "high quality waters." *See infra* part B.2. Clearly, then, the Oklahoma Anti-Degradation Policy prohibits any further degradation of the Illinois scenic river.

We conclude the requirements of the Beneficial Use Limitations/Anti-Degradation Policy are violated when the water quality of a scenic river undergoes any human-caused, detectable change. By "detectable change" we mean any detectable change in a water quality parameter such as turbidity or phosphorus (with the perhaps unnecessary qualification that an *improvement* in water quality is excepted). We do *not* mean a detectable change that violates a numeric criterion for that parameter (e.g., 25 NTUs for turbidity), which criterion would otherwise apply if the Beneficial Use Limitations were not applicable (i.e., if the receiving waters were not designated as a scenic river or otherwise as "(a)" in Appendix A).[35]

[35] For example, assume the turbidity in Lake Frances is 20 NTUs. If the Upper Illinois River (including Lake Frances) were not designated (a) as well as a scenic river, it would be permissible to allow the lake's turbidity to increase to 25 NTUs, the criterion applicable to "Warm Water Lakes" in OWQS § 4.10(b). (The Illinois scenic river is designated a warm water fishery in Appendix A.) Because the lake *is* part of a scenic river, however, the Beneficial Use Limitations apply. In conjunction with the Anti-Degradation Policy, it prohibits any human-caused, detectable change in the turbidity conditions extant at the time of the scenic river designation. Thus, if the turbidity of the lake in 1970 did not exceed 15 NTUs, human activities may not cause it to exceed that level.

The Beneficial Use Limitations/Anti-Degradation Policy are designed to provide *additional* protection beyond that conferred by the numeric limits of other water quality standards. Interpreting these regulations as merely prohibiting violations of otherwise applicable WQS would render them a nullity because, as we have seen, WQS may not be contravened in any waters, regardless of whether these additional regulations apply.

The ALJ on remand, did not explicitly address the Anti-Degradation Policy but did construe the Beneficial Use Limitations. The 1985 version of the Beneficial Use Limitations, which the ALJ deemed applicable, provides: "'All streams and bodies of water designated as (a) . . . are protected by prohibition of any new point source discharge which increases pollutant loading or increased load from an existing point source.'" Decision on Remand, R., A-33, at 4. Construing this regulation in light of the OWQS definition of "pollution,"[36] he concluded: "[T]he Oklahoma parties must show by substantial evidence that the City's discharge will create a nuisance or render the Illinois River in Oklahoma harmful, detremental [sic] or injurious to any beneficial use of the river." Decision on Remand, R., A-33, at 5. The CJO upheld this interpretation with minimal discussion. Second Order on Petitions for Review, R., A-37, at 8. He excused the ALJ's failure to discuss the Anti-Degradation Policy by explaining that the ALJ "implicitly addressed the policy in his detailed analysis of the discharge's potential impact on all relevant water quality parameters." *Id.* at 9; *see id.* at 10 (if ALJ erred in this regard, it was "harmless error"). The CJO reasoned that "if the Fayetteville discharge will not cause a detectible change in any of the relevant water quality parameters [as the ALJ found], it logically follows that there will not be a 'quality degradation.'" *Id.* at 9-10.

[36] "Pollution" is defined as:

> [C]ontamination or other alteration of the physical, chemical or biological properties of any natural waters of the state, or such discharge of any liquid, gaseous or solid substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to . . . legitimate beneficial uses, or to likestock, wild animals, birds, fish or other aquatic life.

Okla.Stat. tit. 82 § 926.1.1., *quoted in* Decision on Remand at 5. The ALJ consulted the statutory definition of "pollution" because the 1985 version of the Beneficial Use Limitations does not define its term "pollutant loading." See our discussion of this compound error in the text.

We have considerable difficulty with the agency's treatment of these crucial Oklahoma regulations. First, and most importantly, the ALJ's interpretation defies the plain language of the Beneficial Use Limitations and the Anti-Degradation Policy that it references.[37] Secondly,

[37] The ALJ's interpretation of the Beneficial Use Limitations is also inconsistent with an earlier position taken by the EPA with respect to permitting additional discharges in the Illinois River Basin. The record contains a letter, dated Oct. 1, 1986, from Lawrence Edmison, Director, Oklahoma Department of Pollution Control, to Kenton Kirkpatrick, Deputy Director, Water Management Division, EPA-Region 6. Mr. Edmison was writing to confirm a conversation with Mr. Kirkpatrick in which they apparently reached an "understanding that Tahlequah's discharge *must not increase loading* on the Illinois River." Addendum to R., OK-4 (emphasis in original). The discussion and letter were precipitated by a debate concerning how the Illinois River's (a) designation affected proposed revisions to the effluent limits in the city of Tahlequah's wastewater treatment plant permit, given that the plant is located a short distance upstream from the Illinois on a tributary not designated (a). An earlier memorandum to Mr. Edmison from Quang Pham, an Oklahoma State Department of Health employee, stated that, because Tahelquah was located on a tributary of an (a) stream, "EPA indicated that *no load increase* could be allowed for Tahlequah." Addendum to R., OK-4 (emphasis added). This memo also referenced a recent EPA study "on eutrophication of Illinois River [that] indicated that phosphorus plays a major role in the stimulation of algae growth in the river." *Id.* at 2. These documents reflect a significantly different understanding of Oklahoma's Anti-Degradation Policy and Beneficial Use Limitation than that adopted by the ALJ and approved by the CJO in this permit proceeding.

the CJO ruled that the ALJ erred in applying the 1985, rather than the 1982, OWQS. Second Order on Petitions for Review, R., A-37, at 5-6. The CJO deemed this error harmless, but we disagree.[38] The 1985 version of the Beneficial Use Limitations, which the ALJ improperly applied, states: "All streams . . . designated as (a) in Appendix A are protected by prohibition of any new point source *discharge which increases pollutant loading*. . . ." OWQS § 7.11 (1985) (emphasis added), *quoted in* Decision on Remand, R., A-33, at 4. Finding no definition of "pollutant loading" in the 1985 rule, the ALJ consulted the statutory definition of "pollution," Okla.Stat. tit. 82 § 926.1.1., to construct his interpretation of the regulation. The applicable 1982 rule, however, prohibits simply "any new point source *discharge of wastes*" (emphasis added). Oklahoma law defines "wastes" as "industrial waste and all other liquid, gaseous or solid substances which may pollute or tend to pollute any waters of the state." § 926.1.2. We do not know whether Oklahoma intended to significantly change the import of the Beneficial Use Limitation by this minor language revision, but we cannot approve a construction of the regulation based on the definition of a term ("pollution") not even contained in the applicable rule.

Finally, the agency's construction of the Beneficial Use Limitation is further flawed by the ALJ's imposition of the burden on Oklahoma to prove that the discharge would "create a nuisance" or "render the Illinois River . . . harmful . . . or injurious to any beneficial use." Decision on Remand at 5. Granted, the opponent of a permit has the "burden of going forward to present an affirmative case at the conclusion of the Agency case on

[38] The CJO ruled the error harmless because, in his view, the 1985 and 1982 standards do not differ materially. Second Order on Petitions for Review, R., A-37, at 6. However, the CJO did not specifically consider the difference between the two versions of the Beneficial Use Limitation and how that discrepancy may have affected the ALJ's conclusion.

the challenged requirement." 40 C.F.R. § 124.85(a)(3)(ii). However, the "Agency has the burden of going forward to present an affirmative case in support of any challenged condition of a final permit," *id.* § (a)(2), and more importantly, the "permit applicant always bears the burden of persuading the Agency that a permit . . . should be issued and not denied," *id.* § (a)(1). By requiring Oklahoma to "show by substantial evidence that the City's discharge will create a nuisance," the ALJ improperly transformed Fayetteville's burden of showing the permit should be issued into a burden on Oklahoma to show that it should be denied.

As for the Anti-Degradation Policy, the CJO concluded there could be no violation of the policy if there would be no detectable change in water quality. However, it is not clear whether the CJO interpreted the policy as *requiring* that there be no detectable change in water quality, or whether he was merely reporting the legal significance of the facts found by the ALJ. Although the CJO determined in his first order that the applicable legal standard is "whether [Fayetteville's] discharges under the permit will result in a detectable violation of the applicable water quality standards," Order on Petitions for Review, R., A-28, at 2, 12-13, his subsequent affirmation of the ALJ's erroneous construction of the Beneficial Use Limitations casts doubt on whether he intended the "no detectable change" test to apply to violations of the Beneficial Use Limitations/Anti-Degradation Policy as well. Because of this ambiguity and the errors in interpreting the Beneficial Use Limitations, we agree with the Oklahoma parties that the agency incorrectly construed and applied both Oklahoma regulations.

2. Existing Degradation of Illinois Scenic River

Under other circumstances, the errors described above might necessitate remanding to the agency with instructions to apply Oklahoma law as we have construed it.

However, given the facts in this record, even proper interpretation and application of Oklahoma water quality standards cannot save this permit. The record contains substantial evidence from which the ALJ could have found that the water quality of the Illinois scenic river has been degraded and that water quality standards were being violated prior to the onset of Fayetteville's discharge to the river (see subpart a. below). We believe that, where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such proposed source may not be permitted.[39] The ALJ and the CJO erred in failing to consider whether or how the river's existing degraded condition is relevant to the decision whether to permit a new source discharge.[40]

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[39] This issue has apparently never before been addressed by a federal court, and it was only touched upon at the administrative hearing. For example, the State of Oklahoma offered evidence (visual slides with accompanying narrative testimony), the stated purpose of which (according to counsel) was to "show that the Illinois River is already in a degraded state and cannot assimilate any more effluent" and that "the Illinois River has already exceeded [its] assimilative capacity." Tr. at 72, 76. An objection to part of this testimony was overruled, Tr. at 76, although the ALJ indicated he had "serious problems with the utility of these slides," *id.* at 72. Later in the hearing, in response to an objection that EPA official Larry Champagne's testimony concerning the history of the Fayetteville permit issuance process was irrelevant, an Oklahoma attorney argued that testimony was "relevant to . . . the issue of whether or not there is degradation" of the Illinois River. Again, the ALJ expressed doubt, but allowed the testimony. Tr. at 154-55.

[40] It might be considered surprising that the record contains sufficient evidence from which to infer that Illinois River water quality is already degraded, given that the parties did not recognize the real significance of this issue. We suspect the evidence was offered largely to show the potential for water quality deterioration due to Fayetteville. Because pollutants in the Illinois River at the Arkansas-Oklahoma border (see discussion in subpart b. below) orginate from upstream, i.e., Arkansas, pollution sources, it logically follows that a new Arkansas source (at a distance upstream comparable to that of existing sources) poses a risk of increasing the

Three factual subissues are essential to our determination that the Fayetteville discharge to the Illinois River may not be permitted: (1) whether the Illinois scenic river is already degraded (i.e., whether its quality has deteriorated since the river's designation in 1970); (2) whether Fayetteville's effluent will reach the scenic river; and (3) whether and how the components of Fayetteville's discharge would contribute to conditions in the Illinois River. Although it is difficult to summarize a record that consists of five boxes and four years of briefs, orders, transcripts, prepared testimony, correspondence, technical reports and miscellaneous other documents, in the following few pages we attempt to capsulize the evidence relevant to these three issues.

a. *Evidence of existing degradation.* First, we address the subject of the degradation of the Illinois scenic river's historically pristine water quality. Our review of the record before the ALJ revealed ample evidence from which the ALJ could have concluded that the river's condition has deteriorated since its designation as a scenic river and that water quality standards are being violated. Examples of this evidence follow.

Myron Knudson, Director of the Water Management Division, EPA-Region 6, testified at the administrative hearing: "There has [sic] been many conversations as

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pollutant load at the state line. There is considerable evidence that the principal point sources of pollution to the Upper Illinois River above Lake Frances are the municipal wastewater treatment plants at Rogers and Springdale, Arkansas. *E.g.*, Gakstatter & Katko, *An Intensive Survey of the Illinois River (Arkansas and Oklahoma) in August 1985* ("Gakstatter Report"), Addendum to Oklahoma Brief, at 3, 5, 77; Tr. at 360-61. The Rogers and Springdale plants are 41.5 and 39.5 miles, respectively, upstream from the state line at Lake Frances. Gakstatter Report at 11-13. These distances are nearly identical to Fayetteville's distance (39 miles) from that point. At least on the basis of distance, it is not unreasonable to except that Fayetteville's effluent will also reach the Oklahoma portion of the Illinois River.

related to what could be done in order to clean up the Illinois River." Tr. at 221. The Attorney General of Oklahoma Robert Henry, in a prepared statement delivered at the hearing, described the Illinois River as "degraded," Tr. at 232, and stated that "the river cannot handle the existing load" of municipal wastewater treatment plant discharges, Tr. at 233. Dr. Stephen Threlkeld, witness for the Oklahoma Wildlife Federation and author of the EPA-funded "Clean Lakes" report on Lake Frances,[41] summarized the results of the "Clean Lakes" study, stating: "Water quality violations of the Oklahoma Water Quality Standards in Lake Frances . . . are in terms of bacteria and in terms of turbidity. . . ." Tr.

[41] The so-called "Clean Lakes" reports are prepared by states pursuant to the requirement therefor in section 314 of the Act, 33 U.S.C. § 1324. Subparagraph (a)(1) of the statute specifically requires that lakes be classified according to "eutrophic condition." The remarks in the Senate Report concerning reauthorization of this section in 1977 are of considerable interest:

> The 1972 act recognized the urgent need for a lake improvement program to restore the significant number of the Nation's 95,000 freshwater lakes that were in eutrophic and deteriorated conditions. The clean lakes program was conceived to respond to this problem . . . .
>
> In the 5 years since Public Law 92-500 went into effect, lake restoration programs essentially have not even begun . . . .
>
> The committee hearing record clearly demonstrates that there is a great interest in lake areas in the restoration and preservation of degraded freshwater lakes . . . .
>
> . . . .
>
> . . . The committee believes this authorization represents a level of effort that reflects the expectations of the Congress for this program, recognizing that the problem of lake eutrophication and deterioration nationwide far exceeds even this authorization level.
>
> The committee is hopeful that the new administration will act to make lake restoration a key element of the EPA's water pollution control program contrary to the EPA's implementation of this section to date.

S.Rep. No. 370 at 69-70, *reprinted in* 1977 U.S.Code Cong. & Admin. News at 4394-95.

at 356. He explained that EPA funded the study "because they wanted to know what the problems were in Lake Frances." Tr. at 359; *see id.* at 374.

Mike Schornick, Oklahoma witness and principal of Schornick/Roberts & Associates, consulting engineers, testified that significant degradation trends are and have been occurring in the Illinois scenic river, including Lake Frances. Tr. at 398-400 (citing prefiled testimony, R., OK-2, at 3-4). He stated that certain figures in his prefiled testimony, which reflect data obtained from regular water quality monitoring conducted by Oklahoma at several points along the Illinois River, illustrate the degradation trends. Tr. at 414, 439. He claimed dissolved oxygen concentrations are reaching levels that violate OWQS. OK-2 at 4. He also stated that Arkansas and Oklahoma monitor phosphorus in their regular 305(b) trend analysis reports[42] to EPA, Tr. at 486, and that all of those reports (1976-81 and 1984) show increasing phosphorus concentrations, Tr. at 489-90. Accounting for the addition of Fayetteville's effluent, Schornick said phosphorus loading and concentrations in Lake Frances will have increased by 106 percent and 76 percent, respectively, over 1974-75 background levels. Tr. at 454-56 (citing prefiled testimony, OK-2, at 4).

Lawrence Edmison, Director, Oklahoma Department of Pollution Control, testified that his department has received "many complaints about odor problems and color problems on the river." Tr. at 542. He also discussed the algae problem on the river in relation to the increasing phosphorus concentrations and decreasing nitrogen concentrations in the water. Tr. at 533-34 (citing prefiled testimony, OK-4, at 3). Based on his years of personal observation of the river and experience handling citizen complaints and looking at trends documented in

[42] Section 305(b) of the Clean Water Act, 33 U.S.C. § 1315(b), requires the states to submit to Congress biennial reports on the condition and quality of their surface waters.

305(b) reports and other reports, Tr. at 546-48, he stated, "I know how bad the river is now; I anticipate that any increased load will only make it worse." Tr. at 548. He testified that the 305(b) reports for both 1984 and 1986 related an "apparent increasing trend" in phosphorus concentrations at all four Illinois River sampling sites, an "apparent decreasing trend" in dissolved oxygen at the same sites (with the exception of the Baron Fork site in 1986), and an "apparent decreasing trend" in nitrogen levels at all four sites (with the exception of Tahlequah in 1986). OK-4, at 2-3. Decreasing nitrogen and increasing phosphorus, he claimed, are "indicative of the algae problem on the river." OK-4, at 2-3.

Oklahoma witness and consultant Dr. William Walker reported that algae concentrations in Lake Frances already reach 90 parts per billion, which is three times the level typically considered indicative of severe nuisance conditions. Tr. at 609-10. Lake Frances is already "supersaturated with nutrients," Tr. at 691; for example, existing concentrations of phosphorus in Lake Frances are more than ten times levels considered typical of eutrophic lakes, or where algae problems start to develop, Tr. at 701. According to Dr. Walker, a "plume [of] degraded water" exists in the river downstream from Lake Frances. Tr. at 701.

Jimmie Pigg, part-time ichthyologist with the Oklahoma Water Quality Division and science coordinator for an Oklahoma school district, Tr. at 65, narrated a slide presentation at the administrative hearing showing changes in the condition of the Upper Illinois River since 1972. In response to an objection concerning the relevance of part of the testimony, counsel for the State of Oklahoma stated that the evidence was offered for the purposes of "show[ing] that the Illinois River is already in a degraded state and cannot assimilate any more effluent" and that "the Illinois River has already exceeded

[its] assimilative capacity." Tr. at 72, 76.[43] Mr. Pigg said Lake Frances "is really a sewage lagoon," which "catch[es] and hold[s] the material from Arkansas." Tr. at 73.

The Gakstatter study reported that "dense phytoplankton populations develop in Lake Frances and also adversely affect water clarity in the Illinois River for several miles downstream," and that this growth is "stimulated by excessively high phosphorus levels originating from [the sewage treatment plants at] Springdale and Rogers [in Arkansas]." Report at 5.[44] The Gakstatter Report also

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[43] An Arkansas party attorney objected to the relevance of certain slides, which showed Sager and Flint creeks (both Illinois River tributaries) below Siloam Springs, Arkansas's, treatment plant. In defending against the objection, the Oklahoma attorney stated that the slides were "relevant to show that Fayetteville should not be allowed to discharge because it will just exacerbate the existing violation of Oklahoma Water Quality Standards." Tr. at 76. The objection was overruled, *id.*, although the ALJ indicated he had "serious problems with the utility of these slides," *id.* at 72. Mr. Pigg testified to 30 years of personal experience with the Illinois River, including making "collecting trips" and preparing "hundreds of reports" on changes in the fish population. *Id.* at 65, 86. He was denied the opportunity to offer an opinion, based on his experience with the river, as to whether algae in the river had increased during those 30 years, apparently on the ground that he had not been qualified as an expert. *Id.* at 86-87.

[44] It should be noted that the Gakstatter study, on which the ALJ relied, *see* Decision on Remand, R., A-33, at 10-11, 14-15, was conducted during a two-week period of very atypical weather in August 1985. Precipitation for that month was more than three times the normal amount, streamflow was 50% greater than the normal average, and three inches of rain fell *during* the survey. Gakstatter Report at 1, 23. Throughout the report the authors conceded several possible effects of these conditions—increased turbidity due to increased surface runoff and scouring of stream sediments, decreased concentrations of chemical parameters due to dilution, and decreased incidence of periphytons (surface algae) because of high stream flow. Moreover, even though the ALJ relied [illegible] for evidence that the Fayetteville discharge would not affect the Illinois River, the Gakstatter study supports our conclusions

provides brief summaries of the results of several other studies. For example, the U.S. Geological Survey (USGS) in 1984 reported the Illinois River did not meet water quality standards for dissolved oxygen, phosphorus, and fecal coliform bacteria; Threlkeld (1983) described Lake Frances as "very euthrophic" due to phosphorus from Springdale and Rogers; the Oklahoma State Water Quality Laboratory (1977) reported Lake Frances was in the "late stages of eutrophication," due partially to "elevated Illinois River nutrients"; and two EPA (1977) studies classified as eutrophic both Lake Frances and, to a lesser extent, Tenkiller Reservoir. Gakstatter Report at 7-9.

The evidence before the ALJ also included the record of a hearing conducted by the Arkansas-Oklahoma Arkansas River Compact Commission on June 3-4, 1985. *See* R., C-1, Tr. at 307. The subject of the Compact Commission hearing was the Illinois River situation and the (at that time) proposed Fayetteville permit. The Commission issued an order (also included in the administrative hearing record) containing several findings concerning the degraded condition of the river. Findings of Fact, Conclusions of Law, and Commission Order ("Compact Commission Order"), R., OK-5. The Commission began by observing that, historically, the Illinois River "has been recognized by Oklahomans as a watercourse of unique natural scenic beauty and high quality . . . spring-fed waters [that] ran clear and plentiful." ¶ 16. But, the Commission continued, the "Upper Illinois River System in Oklahoma has, in recent years, undergone a process of degradation in water quality, and the process appears to be on an escalating trend." ¶ 32.

Other findings by the Commission include: "[T]he Illinois River has degraded substantially over the past decade . . . [including] radical changes in the river's

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concerning the existing degradation of the river and the fact that Fayetteville's effluent will be carried downstream to the Illinois River in Oklahoma.

water color and turbidity, and the existence of increased alga growth [and] offensive odors. . . ." ¶ 33. Violations of the dissolved oxygen standard have been documented by the Oklahoma Department of Health immediately below Lake Frances. ¶ 35. Degradation of dissolved oxygen is also occurring farther downstream from Lake Frances. ¶ 36. A 1984 USGS study (presumably the one cited in the Gakstatter Report) showed violations of Arkansas WQS in the Arkansas portion of the river. ¶ 38. Phosphorus concentrations are continuing to increase in "significant and undesirable amounts." ¶ 40. The "Arkansas guideline for maximum phosphorus concentration to prevent eutrophication has already been greatly exceeded in certain Arkansas and Oklahoma river segments." ¶ 40. The "trend of phosphorus degradation of the Upper Illinois River appears to be occurring at all locations." ¶ 41. Lake Frances is in "an obvious state of eutrophication, marked by putrid smells and dark brown turbid waters." ¶ 45. Based on Oklahoma's 305(b) report for 1978-83, "[d]egradation trends also appear to be occurring with reference to levels of potassium, calcium, sodium, copper and hardness." ¶ 46. The Commission acknowledged Arkansas's "exceptions" to certain of Oklahoma's sampling methods and conclusions, ¶¶ 47-48, but decided Oklahoma's methods were generally accepted in the scientific community and sanctioned by EPA, ¶ 49. The Compact Commission concluded: "[M]an-made pollution (degradation) of the waters of the Upper Illinois River in both Arkansas and Oklahoma . . . as defined by the compact, [has] occurred and said pollution continues to occur at increasing and alarming rates. . . . Further, said pollution is of grave interstate magnitude and significance." Conclusions of Law ¶ 9.

The record before the agency also included the Fayetteville 201 Facilities Plan, prepared by Fayetteville in conjunction with its application for an EPA construction grant for its new treatment plant. *See* 40 C.F.R.

§ 35.2030(b)(3) (specifying the requirements for such plans). The plan states that "nutrient loadings from non-point sources and existing discharges do adversely impact the Illinois under present conditions." CH2M Hill & McClellant Consulting Engrs., Inc., *201 Facilities Plan Environmental Information Document for City of Fayetteville, Arkansas* (Jan. 1984), R., ARK-6, at 2-20. The plan also states that the "net impact of point and nonpoint sources is to increase nutrient loading, with consequent increases in algal growth and increased turbidity." *Id.* at 2-22. The plan described the biological community in the reach of the river near and below Lake Frances as "slightly degraded." *Id.* at 2-24. The *Illinois River Assessment Report*, also in evidence, declares as one of its "alarming" conclusions: "Overwhelming existing documentation demonstrates that significant degradation of the Upper Illinois River has already occurred." Roberts/Schornick & Assocs., *Illinois River Assessment Report* (Dec. 1984), R., ARK-6, at ii.

At this juncture we note that the absence of any evidence in the record that enforcement efforts have been undertaken to remedy the pollution problems in the Illinois River does not undermine our conclusion that water quality violations have occurred and no doubt continue to occur. Enforcement actions are not necessary to document water quality degradation; it is only necessary that there be reliable evidence that water quality criteria have been exceeded.[45] *See* 33 U.S.C. § 1319(a)(1) ("Whenever, *on the basis of any information available* to him, the Administrator finds that any person is in violation of any condition . . . in a permit . . . he shall [commence enforcement proceedings]" (emphasis added)). Such evidence may be found in the dischargers' own monitoring reports, *see* 40 C.F.R. § 122.41(j); the states' obligatory 305(b) or 205(j) (33 U.S.C. § 1285(j)) reports; or other studies or surveys conducted according to accepted methods.[46]

[45] Additionally, in the circumstances of this case, evidence that such exceedances are ongoing may be required. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57-59, 108 S.Ct. 376, 381-82, 98 L.Ed.2d 306 (1987) (EPA may take enforcement action against a discharger for wholly past violations of permit conditions, but a citizen suit to enforce permit conditions must be based on evidence of ongoing violations). Where a decision to deny a permit is based in part on a finding that the water quality of the receiving waters is degraded, it is reasonable to require evidence of the continuing nature of the WQS violations. Because eutrophication is not a rapid process (nor can the process be reversed rapidly), the eutrophied state of the Illinois River almost certainly persists and perhaps has worsened since the date of the most recent evidence of degradation in the record. We believe there is substantial evidence in the record to support this conclusion. *Cf. Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693-95 (4th Cir.1989).

We also point out that this case is easily distinguished from a situation in which a presumption of ongoing violations (for purposes of taking enforcement action) is premised on past violations of *technology-based effluent limitations* (for instance, failures of control equipment). *E.g., Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir.), *cert. denied*, 484 U.S. 985, 108 S.Ct. 501, 98 L.Ed.2d 500 (1987). It is admittedly unreasonable to assume, on the basis of "past, sporadic or largely unconnected permit violations," that a permittee is currently violating the effluent restrictions of his permit. 817 F.2d at 1173. But it is highly probable that water quality violations (e.g., eutrophication effects) that result from the cumulative impacts of the ongoing discharges of several sources will continue as long as the discharges continue. This case is an example of such a situation.

Finally, we note that, even if the Illinois River's water quality has improved since the Fayetteville permit was erroneously granted (the record contains no evidence tending to suggest this), under the Oklahoma Anti-Degradation Policy no degradation of that improved quality may be allowed. OWQS § 3, para. 4.

[46] Section 106(e) of the Act, 33 U.S.C. § 1256(e), requires states to conduct water quality monitoring "including classification according to eutrophic condition" and to annually update monitoring data and include the data in 305(b) reports in order to qualify for federal grants for pollution control programs. According to EPA, the 305(b) report is the "primary water quality problem assessment document under the Act." 50 Fed.Reg. 1774, —— (1985) (WL pp. 22-23 of 57) (preamble to final rule, 40 C.F.R. Parts 355 and 130;

Similarly, a history of lax enforcement with respect to existing sources does not justify allowing a new source of pollution. Water quality standards prescribe the desired condition of surface waters to be met at all applicable times; they do not serve merely as a yardstick for enforcement efforts when enforcement personnel may be available to ascertain compliance.

Clearly then, the record before the ALJ contains substantial evidence from which it can be concluded that water quality in the Upper Illinois River is degraded and that Oklahoma water quality standards for nutrients, dissolved oxygen, and/or aesthetics have been and probably continue to be violated. The decisions of EPA's judicial officers ignore the bulk of this evidence. To our consternation, however, the ALJ believed some of the relevant testimony chronicled above, yet remained oblivious to its ramifications. In his Decision on Remand, for example, the ALJ stated that "dissolved oxygen violations in Oklahoma *are occurring* without [Fayetteville's] discharge." R., A-33, at 19 (emphasis added). It also appears he accepted the testimony that nutrients, turbidity, and solids standards were being violated, although he disputed the conclusion that Fayetteville "would increase the spatial and temporal . . . frequencies" of those violations. *Id.* at 14-15 (citing Dr. Walker's and Dr. Gakstatter's testimony). Significantly, no witness refuted the testimony concerning the river's currently degraded condition, nor did the ALJ discredit (or even comment on) any of that testimony. He simply failed to recognize the significance of this testimony with respect to the permitting decision at hand.

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§ 130.8(b)); *see also* 40 C.F.R. § 130.8(a) ("report serves as the primary assessment of State water quality"). EPA's regulations state that problems identified in the 305(b) report "should be emphasized . . . in the State's [water quality management plan] . . . under sections 106 and 205(j) of the [CWA]." 40 C.F.R. § 130.8(a). In years in which a 305(b) report is not required, states may meet their annual 205(j) report requirement by supplementing the most recent 305(b) report with a certification that it still represents current conditions, or by updating it as necessary to reflect current conditions. 40 C.F.R. § 130.8(d); *see also* 50 Fed. Reg. 1774, —— (1985) (WL p. 23 of 57).

b. *Downstream transport of pollution from Fayetteville.* Next, we address the question of the downstream migration of Fayetteville's effluent. Our review of the transcript revealed that no person involved in the administrative hearing seriously disputed that pollution from Fayetteville would reach the state line; instead, the parties debated how much would reach Oklahoma and what effect, if any, it would have. Indeed, in his final opinion, the ALJ recites evidence that twenty to twenty-five percent of the nutrients (specifically, phosphorus) in Fayetteville's effluent would be "bio-available" at the Oklahoma state line. Decision on Remand, R., A-33, at 8. The evidence supporting downstream transport includes:

According to EPA witness and employee Garrett Bondy, the Waste Load Allocation Study performed by Arkansas predicts a six-percent increase in the phosphorous load to Lake Frances due to Fayetteville. Tr. at 147. Fayetteville witness Dr. Cliff Thompson testified to a 2.4-percent increase, based on a discharge of 35 lb. phosphorus per day. Tr. at 280-81. (Fayetteville's permit allows it to discharge 54 lb. phosphorus daily.) Thompson, whose firm CH2M Hill prepared the 201 Facilities Plan for the Fayetteville plant, said: "We recognized that we would be adding discharge to the Illinois River." Tr. at 266-67. Dr. Robert Blanz, former deputy director of the Arkansas Department of Pollution Control and Ecology, testified that Fayetteville's waste could reach Lake Frances, the Illinois River below the lake, and Tenkiller Reservoir. Tr. at 308-11, 321-22. He "guessed" twenty to twenty-five percent of the phosphorus from the plant would be cycled through the Upper Illinois River system rather than taken out of it. Tr. at 311-12; *cf.* Decision on Remand at 8.

Mike Schornick, testifying for Oklahoma, suggested that sixty percent of Fayetteville's phosphorus discharge would reach Lake Frances (based on his review of existing data). Tr. at 454-56 (citing prefiled testimony, R., OK-2, at 4). He stated that treatment plant operation would result in measurable changes in Lake Frances during low flow conditions. Tr. at 461-62. Another Oklahoma witness, Dr. Walker, testified that Fayetteville would increase the phosphorus load to Lake Frances by 4.69 percent in an average flow year. Tr. at 610-11 (referring to amended Table 5 in his prefiled testimony, R., OK-9).

The Arkansas River Compact Commission found that Lake Frances no longer acts as a "nutrient trap"; thus, the "addition of any new waste effluent discharge into the Illinois River from above Lake Frances . . . will be transmitted downstream below Lake Frances into the Illinois River in Oklahoma." Compact Commission Order, R., OK-5, Findings ¶ 44. The Commission further stated that "the potential for or threat of an increased phosphorus loading . . . from [Fayetteville's] discharge to the Illinois River in Oklahoma clearly exists." *Id.* ¶ 73.

Finally, the 201 Facilities Plan reports "considerable downstream transport of enriched organic matter" in the Upper Illinois River. R., ARK-6, at 2-22. Citing the Oklahoma State Department of Health's conclusion that "nearly 60 percent of the nitrogen and 74.4 percent of the phosphorus load measured in the Illinois River at Tahlequah, Oklahoma was [sic] contributed by sources above Lake Frances," the report concludes the "data clearly show that point and nonpoint sources in Arkansas are a major source of nutrients in the Illinois River of Oklahoma." *Id.* at 2-24. The report states that additional nutrients introduced to Lake Frances "may be passed through [the lake] to downstream reaches of the Illinois," *id.*, and that "transport of dissolved and suspended nutrients from Arkansas sections of the Illinois basin may have some effects on Tenkiller Reservoir in Oklahoma,"

id. at 2-28. "Fayetteville's treated effluent," the report claims, "would increase downstream nutrient concentrations by . . . perhaps 10-15 percent . . . during low-flow conditions." *Id.* at 4-13.

Based on the foregoing, which is just a sample of the record evidence pertaining to the downstream transport of Fayetteville's effluent, we conclude there was substantial evidence before the ALJ to support a finding that Fayetteville's effluent would reach the Illinois scenic river.

c. *Significance of Fayetteville effluent to existing conditions.* Lastly, we recite some of the evidence relevant to the third important subissue—whether and how the components of Fayetteville's discharge can be expected to contribute to water quality conditions in the Illinois River. Although this is more a scientific question than it is a legal one, the inquiry helps to tie together the conclusions drawn from the first and second subissues discussed above. The evidence includes:

Mike Schornick asserted that Fayetteville's effluent will result in increased algae in Lake Frances. Tr. at 434-35 (citing prefiled testimony, OK-2, at 15). He discussed the relation between phosphorus and nutrient loading and dissolved oxygen levels, Tr. at 436, offering a brief explanation of how algae can increase and decrease the concentration of oxygen in water, Tr. at 438.[47] He noted that

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[47] This crucial fact seems to have eluded the ALJ, who was aware that photosynthesis by algae *produces* oxygen, but obviously did not understand that respiration by algae at night *consumes* oxygen, as does the process of decay of organic materials in the stream. *See* Decision on Remand, R., A-33, at 19 (misciting the eminently qualified Dr. Walker, *see* R., OK-7, regarding the mechanisms by which dissolved oxygen levels are reduced, *see* R., OK-8, at 12-13). *See also* Tr. at 129 (EPA witness Bondy's testimony concerning sediment oxygen demand).

The fact that algae reduce oxygen concentrations in streams (in addition to causing other problems) is recognized by Congress and EPA and has been widely acknowledged in the case law. *See, e.g.*,

increased algae can result in many aesthetic problems, including taste, odor, and the appearance of a river. Tr. at 477-78. He reported that the decreasing dissolved oxy-

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Chemical Mfrs. Ass'n v. U.S. EPA, 870 F.2d 177, 218 & n. 149 (5th Cir.1989) (Congress in amending the CWA "specifically recognized that algae are a significant cause of water quality problems," i.e., that " 'algae [have] grown so rapidly that sufficient oxygen is not available to support other forms of life.' " (quoting legislative history)). In *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 575 (D.C.Cir.1980), a case repeatedly cited to the ALJ by the Oklahoma parties, the court described the same problem facing the Illinois River: "Excessive nutrient levels degrade water quality both because the proliferation of algae is itself a nuisance and because *algae respiration and subsequent death and decay use up oxygen* dissolved in the river's waters." (Emphasis added.)

Nevertheless, relying on evidence submitted by the Arkansas parties that Fayetteville's effluent would experience "complete oxygen recovery" before it enters the Illinois River, the ALJ concluded that "it is not possible for the City's effluent to violate the Oklahoma dissolved oxygen standards." *See* Decision on Remand at 18-19. The "re-aeration" described by the Arkansas parties occurs as a result of turbulence in Mud Creek and possibly Clear Creek above Clear Creek's confluence with the Illinois. This essentially mechanical process takes no account of nutrients in the effluent and their impact on algae growth and, eventually, oxygen levels.

The ALJ also labored under apparent misapprehensions concerning the significance of phosphorus concentrations in the river and the relation between phosphorus assimilation and eutrophication. For example, the ALJ stated: "[T]he assimilative processes [at low flows] is at its [sic] most effective stage and therefore removes [sic] more nutrients upon which the algae feed. . . ." Decision on Remand at 8. The glaring error of this statement is that the uptake of nutrients by algae is itself one of the "assimilative processes" that is "most effective" at low flows. Uptake of phosphorus by algae does not *reduce* the potential for eutrophication, it is an intial step of the process! The ALJ also cited testimony that "all of the phosphorus below Lake Francis [sic] would be assimilated out of the time it reached Lake Tenkiller." Decision on Remand at 10. The flaws in this statement are: (1) it presumes the nutrients standard does not apply to streams (which we have seen is contrary to Oklahoma law), and (2) it ignores the fact that one of the processes by which phosphorus "assimilates out" (i.e., which cause

gen trends in the Upper Illinois have paralleled increases in phosphorus and other nutrients, calling this "strong evidence that there is a definite relationship between the two phenomena," as well as a logical consequence of increased biological activity. OK-2, at 4. In his opinion, the Fayetteville discharge will "precipitate lower dissolved

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phosphorus concentrations in the water to decrease) is uptake by algae, which leads to eutrophication.

The ALJ's erroneous conclusions may derive at least in part from the inconsistent definitions of the term "assimilation" used by various witnesses. *See, e.g.*, Tr. at 308-09, 319, 491, 697. ("Assimilation" in this context essentially refers to the uptake and removal mechanisms by which nutrients are taken out of the water—uptake by plants and animals, animals feeding on plants, sedimentation, etc. The witnesses disagreed, for example, as to whether assimilation includes dilution.) But the fault is not entirely the witnesses'. As explained above, the ALJ overlooked or misunderstood evidence of fundamental biological processes. He also confused "assimilation" with "assimilative capacity." Ostensibly defining "assimilation," he quoted the 1985 OWQS Appendix C definition of "assimilative capacity" (the "amount of pollution a stream can receive and still maintain the W.Q.S. designated for that stream"). Decision on Remand at 7. Yet the two terms are not interchangeable, nor did the ALJ even acknowledge the existence of two discrete terms. Moreover, as we discuss later in the text, the CJO later determined that the 1982, not the 1985, OWQS are applicable to this permit. (The 1982 definition of "assimilative capacity" varies somewhat from the 1985 definition.) It should be noted that the "assimilative capacity" of streams protected by the Beneficial Use Limitation may be very limited (given that any detectable change in a water quality parameter violates the applicable WQS for such a stream). Moreover, the term may have limited relevance to the Upper Illinois River, given that existing water quality problems in the Illinois River demonstrate that the "assimilative capacity" of the stream has already been surpassed.

These are grave misunderstandings because the phenomena of oxygen depletion, which results from "over-fertilization" of a stream and the consequent increase in organic matter, and phosphorus uptake by aquatic organisms, are intrinsic to the eutrophication process. That the ALJ did not comprehend these fundamental concepts casts doubt on his conclusions that Fayetteville's discharge would not jeopardize compliance with the applicable WQS.

oxygen concentrations and more frequent violations of the dissolved oxygen standards." *Id.* at 5. He also contends Fayetteville will cause violations of the copper standard. *Id.*

Robert Blanz, testifying for Arkansas, stated that "scouring" (the action of high stream flows moving sediment on the stream bottom and along its banks) resuspends sedimented material, including algae, thus increasing turbidity. Tr. at 322. EPA official Garrett Bondy testified that the Fayetteville discharge "may raise" sediment oxygen demand, thus potentially contributing to reduced dissolved oxygen concentrations in the river. Tr. at 129; *see also id.* at 133, 135. Dr. Threlkeld stated that "algal growth and resuspension of sediments are a part of turbidity [in Lake Frances]." Tr. at 356.

Dr. Walker agreed that one cause of water clarity problems in Lake Frances is algae. (The other is inorganic turbidity.) Tr. at 680-81 (citing Gakstatter Report; *see id.* at 78). He believes the increase in nitrogen pollution of the Illinois River attributable to Fayetteville's discharge might increase the amounts of periphyton (surface algae) in backwater areas and under low flow conditions. Tr. at 693. He further believes these impacts would become more significant as the phosphorus discharges from upstream sources decrease. Tr. at 694, 716-18.[48] In Dr.

[48] There was testimony at the hearing that future reductions are expected in the phosphorus discharges of three existing municipal treatment plants in the Upper Illinois basin. (In fact, Oklahoma asserts that it was error for EPA to consider these anticipated reductions in deciding whether to grant the Fayetteville permit. Oklahoma Brief at 18-22.) These reductions would result from the installation of new treatment facilities, but would not be mandated by the plants' permits. Phosphorus concentrations in the effluent from the new plants would be approximately 1 milligram per liter (mg/l, or about 50 percent less than previous concentrations. Initial Decision, R., A-26, at 13; R., ARK-1, at 2, 4-5. Dr. Walker testified that, even if all point sources in the basin were

Walker's opinion, an increased growth of periphyton (i.e., more floating algal "mats and scums on the river) would violate Oklahoma's aesthetics standard. Tr. at 705. He further asserted that Fayetteville's discharge would increase turbidity in Tenkiller Reservoir. Tr. at 711.

Lawrence Edmison, director of Oklahoma Department of Pollution Control, testified that algae degrades the river and violates the aesthetics and coloration standards. OK-4, at 3. He related the algae problem in the river to increasing phosphorus and decreasing nitrogen concentrations in the water. Tr. at 533-34 (citing prefiled testimony, OK-4, at 3). The record also includes a memorandum to Lawrence Edmison from Quang Pham, an Oklahoma State Department of Health employee, which references a recent EPA study "on eutrophication of the Illinois River [that] indicated that phosphorus plays a major role in the stimulation of algae growth in the river." Addendum to OK-4, at 2. Gakstatter and Katko concluded tentatively that "controlling algal growth in Lake Frances will result in a marked improvement in water clarity in the reservoir and in the Illinois River reach below the dam." Gakstatter Report at 76. Finally, the 201 Facilities Plan reports that the "high productivity of the Illinois [River] waters causes considerable downstream transport of enriched organic matter" and the "net impact of point and nonpoint sources [such as Fayetteville] is to increase nutrient loading, with consequent increases in algal growth and increased turbidity." ARK-6, at 2-22.

We conclude from the foregoing three-part review of the record that there is substantial evidence that degraded

controlled to the 1 mg/l level, the phosphorus load to Lake Tenkiller would be reduced by only 40 percent, and that a phosphorus concentration of 1 mg/l is about forty times the concentration sufficient to produce a significant algal bloom. Tr. at 648-49; *see also* Prefiled testimony of Jack Gakstatter, R., B-56, at 4 (impact of existing plants "could be substantially attenuated by phosphorus removal . . . to *at least* . . . 1 mg/l"; "benefits to Lake Frances of reducing phosphorus to *at least* 1 mg/l" (emphasis added)).

water quality conditions currently exist in the Illinois River in Oklahoma and that these conditions have been caused at least in part by pollutants that are constituents of Fayetteville's effluent. There is also substantial evidence that Fayetteville's effluent will be transported downstream to Oklahoma; thus, the plant can be expected to contribute to the ongoing deterioration of the scenic river and possibly Tenkiller Reservoir as well. It is our inescapable conclusion, given this evidence and the requisites of federal-Oklahoma state water pollution control laws, that the Fayetteville discharge to the Illinois River may not be permitted.[49]

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[49] Issuance of Fayetteville's permit requires substantial evidence (1) that current water quality meets applicable WQS *and* that Fayetteville's effluent would not affect maintenance of the applicable WQS; *or* (2) if current water quality does not meet applicable WQS, that Fayetteville's effluent would not reach the Illinois scenic river. Instead of directly addressing whether the record contains this requisite documentation, we have marshalled the opposing evidence and concluded that there is substantial evidence that the Illinois River *is degraded* and that Fayetteville's effluent *will reach* the state line. These conclusions negate the need for conducting the usual substantial-evidence inquiry. However, we do *not* suggest by this approach that the opponent of a permit bears the burden of making the showings that our examination of the record has revealed.

To understand this distinction, it is crucial to review how the Clean Water Act and EPA's implementing regulations allocate the burden of proof in NPDES permitting decisions. Recall that the "permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants [to] be discharged should be issued and not denied and this burden does not shift." Initial Decision, R. A-26, at 10 (quoting 40 C.F.R. § 124.85(a)(1)). In other words, it is the proponent of a permit who bears the burden of showing that a discharge *will comply with* all applicable standards, not the opponent of a permit who must show that a discharge *will violate* applicable requirements.

Moreover, EPA's decision to issue a permit (which decision necessarily reflects its judgment that the permit assures compliance with all applicable requirements of the CWA) must be supported by substantial evidence. 5 U.S.C. § 706(2)(E). Denial of a permit,

IV. Discussion and Conclusions

As explained in part I. of this opinion (Standard of Review), we normally give considerable deference to an agency's interpretation of its obligations and authority under a statute it administers. Here, EPA's view that no discharge to a navigable water may be permitted unless it will comply with the federally approved standards of all affected downstream states is consistent with the statutory language and EPA's implementing regulations, supported by the legislative history, and reasonable on its face; therefore, it is entitled to substantial deference. *See Chevron*, 467 U.S. at 844-45, 104 S.Ct. at 2782-83. As we discussed in part III.A. *supra*, we adopt the agency's view on this question of statutory interpretation as our first holding in this case.

The balance of the agency's actions, however, do not warrant similar respect. In part III.B. we have identified several errors or deficiencies in EPA's interpretation of the applicable Oklahoma regulations, in the agency's factual findings, and in its application of the law to the relevant facts. We believe the most serious of these errors is the failure to attribute any significance to the existing

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on the other hand, need not be supported by substantial evidence, because of the CWA's fundamental premise that pollution is unlawful and EPA's discretion to issue permits under 33 U.S.C. § 1342(a). In this case the ALJ erred in imposing the burden on the permit opponents to show that water quality standards would be violated. For example, he required the Oklahoma parties to "show by substantial evidence that the City's discharge will create a nuisance," Decision on Remand at 5, and he cited the "lack of substantial evidence to support the notion that the small increases in phosphorus . . . would result in an increase in eutrophication," *id.* at 8. Ironically, the record does contain substantial evidence showing that the discharge would violate CWA requirements. This evidence is more than sufficient to meet the permit opponent's burden of "going forward to present an affirmative case," 40 C.F.R. § 124.85(a)(3)(ii), and it reinforces our conclusion that the Fayetteville permit may not issue.

WQS violations. In this section we discuss the errors on which we found our conclusion that the Fayetteville permit decision must be set aside as "arbitrary, capricious, . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

As a preliminary matter, EPA undermined our usual deference to its special expertise by the failure of its presiding officer to consider an important scientific principle, the oxygen-reducing effects of algae respiration and decay, and by his incomplete understanding of phosphorus assimilation.[50] "EPA's failure to base its position on scientific or policy considerations . . . [is] cause for reduced deference." *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 169 (D.C.Cir.1982). Similarly, a lack of thoroughness on the part of the agency warrants reduced deference. *Id.* at 166 (" 'thoroughness . . . of an agency's reasoning' bears on the proper degree of deference" (quoting *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44, 70 L.Ed.2d 23 (1981)). In light of other errors in the agency's reasoning, however, we need not decide whether these flaws alone constitute reversible error.

EPA also misinterpreted and misapplied the Oklahoma nutrients standard and the Beneficial Use Limitations/Anti-Degradation Policy. In these respects the permit decision is flawed as a matter of law and must be set aside. 5 U.S.C. § 706(2)(A).

Furthermore, the agency's judicial officers believed expert testimony that nutrients in Fayetteville's discharge would be transported downstream to Oklahoma, but they inexplicably rejected or discounted testimony concerning the probable eutrophying effects of these nutrients. This error may have resulted in part from the officers' faulty understanding of eutrophication processes and/or their erroneous interpretation of the nutrients standard. In any

[50] *See supra* note 47.

event, the net result is that the agency's decision to permit the Fayetteville discharge to the Illinois River "runs counter to the evidence before the agency" and lacks a 'satisfactory explanation . . . including a rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. at 2856 (citation omitted). As such, it is arbitrary and capricious and must be set aside. *Id.*

Finally, we hold that EPA's decision is arbitrary and capricious on one significant additional ground. We believe that EPA, in failing to consider the significance of the evidence of ongoing WQS violations, has not only rendered a decision that "runs counter to the evidence," but has "entirely failed to consider an important aspect of the problem." *Id.* We consider this the principal flaw in the agency's decision-making rationale.

It cannot be doubted that ongoing violations of federally approved water quality standards constitute "an important aspect" of the decision whether to permit an additional source of pollution on a waterway. Adherence to EPA's treatment of the facts and law of this case would fatally undermine the federal water pollution control strategy engineered by the Clean Water Act and enhanced by Oklahoma law. As we have seen, the "first principle of the [CWA] is . . . that it is unlawful to pollute at all. . . . The foremost national goal enunciated by Congress is the complete elimination of the discharge of pollutants." *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 123 (D.C.Cir.1987) (referring to 33 U.S.C. § 1251(a)(1); *see also* § 1251(a)(6)).[51]

[51] There is extensive legislative history on the goals and policy section, § 101, of the CWA, 33 U.S.C. § 1251(a). See *National Wildlife Fed'n*, 693 F.2d at 179-81, for one overview of that history. The D.C. Circuit stated:

> [T]he sponsors of the Act successfully insisted on a zero-discharge-of-pollutants goal despite strong objection from both within and without. . . . Senator Muskie, the Senate sponsor

The CWA further declares that it is the "primary responsibilit[y] . . . of States to prevent, reduce and eliminate pollution." § 1251(b). In at least one court's opinion, the "language of the Act indicates that striving for the utter abolition of pollution is an acceptable approach for states to take." *Union Oil Co.*, 813 F.2d at 1487 n. 6. Oklahoma dutifully heeds the Act's mandate. Its water pollution control policies and requirements call for: "protect[ing], maintain[ing] and improv[ing] the quality" of the waters of the State, Okla Stat. tit. 82, § 926.2; employing the permitting system "to prevent, control or abate pollution," *id.* § 926.3.10; classifying state waters "for the purpose of progressively improving the[ir] quality" and "upgrading them from time to time by reclassifying them," *id.* § 926.6.A.; and allowing "no degradation" of the state's scenic rivers, OWQS § 3. Common sense dictates that a pollution control strategy designed to prevent, abate, and eliminate pollution would be subverted by allowing a new source of pollution on a currently polluted watercourse.

This judgment is corroborated by the Supreme Court's pronouncements concerning the legislative purposes behind the CWA. After painstaking review of the Act's legislative history, the Court declared that "Congress' intent . . . was clearly to establish an all-encompassing program of water pollution regulation" and that the " 'major purpose' of the [CWA] Amendments was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.' " *Milwaukee v. Illinois*, 451 U.S. at 318, 101 S.Ct. at 1793 (citation omitted; emphasis in original); *see also Ouellette*, 479 U.S. at 489, 107 S.Ct. at 810.

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and principal force behind the bill, stated, in the post-conference debate on the bill: "These [goals] are not merely the pious declarations that Congress so often makes in passing its laws; on the contrary, this is literally a life or death proposition for the nation."

693 F.2d at 179 (quoting 118 Cong.Rec. 33,693 (1972)).

The Court explained that before it was amended in 1972 and 1977 the Clean Water Act relied solely on water quality standards to control and reduce pollution. But that system "proved ineffective. The problems stemmed from the character of the standard themselves, which was focused on the *tolerable effects rather than the preventable causes* of water pollution. . . ." *State Water Resources Control Bd.*, 426 U.S. at 202, 96 S.Ct. at 2023 (emphasis added). The Court described the effect of the amendments:

> [The 1972] Amendments introduced two major changes. . . . First, the Amendments are aimed at achieving maximum "effluent limitations" on "point sources," as well as achieving acceptable water quality standards. . . .
>
> Second, the Amendments establish the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations. . . .
>
> Water quality standards are retained [in the amended Act] as a supplementary basis for effluent limitations . . . *so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.* . . .

Id. at 204-05 & n. 12, 96 S.Ct. at 2024-25 & n. 12 (emphasis added).

Water quality standards could still be said to "focus on the tolerable effects of water pollution," but the focus of the NPDES program clearly is the "preventable causes" of pollution. As the passage quoted above reveals, even licensed polluters in compliance with their permit limitations may be further regulated if necessary to ensure that water quality standards are achieved and maintained. This authority to regulate, along with the absence of any right to pollute, necessarily subsumes the authority to deny a request permit. These powers are essential to the ability to prevent pollution and thereby accomplish the

Act's ultimate goal of eliminating pollutant discharges to water.[52]

EPA and the Arkansas parties urge that the Fayetteville discharge should be permitted because its individual impact on Illinois River water quality will not be detectable. While this may prove true (and we pass no judgment thereon), we reject the argument because of its unavoidable results.[53] If we were to accept this logic, once water quality standards in a stream were violated, additional new discharges might be permitted indefinitely so long as each one would have an unmeasurable individual impact. The absurdity of such a policy is manifest.

Congress cannot reasonably be presumed to have intended to exclude from the CWA's "all-encompassing program," 451 U.S. at 318, a permiting decision arising in

[52] EPA is never *required* to issue a discharge permit; rather, under 33 U.S.C. § 1342(a)(1), EPA "*may* . . . issue a permit . . . upon condition that such discharge will meet . . . all applicable requirements." (Emphasis added.) *See also* § 1342(d)(4) (EPA "*may* issue" a permit pursuant to § 1342(a) if it objects to a state-issued permit) (emphasis added)). The CWA confers no "right to pollute"; indeed, it takes away any license to pollute unless a permit is first obtained. In fact, as we saw in the previous section of this opinion, EPA may not permit a discharge if compliance with applicable water quality requirements cannot be insured. 33 U.S.C. § 1341(a)(2). Plainly, EPA is empowered to deny a permit under the circumstances of this case.

[53] Moreover, there is no "de minimis" theory applicable to CWA violations. *E.g., Union Oil*, 813 F.2d at 1490-91 (CWA "makes no proviso for 'rare' violations"). *See also* Order on Petitions for Review, R., A-28, at 13 (improper to imply a *de minimis* test); 49 Fed.Reg. at 38,038 (according to EPA, "water quality standards . . . are legally required to be met *at all times*" (emphasis added)). In this regard, the Clean Water Act and Oklahoma's Anti-Degradation Policy, which we have explained prohibits *any detectable* change in the water quality of scenic rivers, can be contrasted to the Clean Air Act, 42 U.S.C. §§ 7401-7642, which prohibits "significant deterioration" of air quality in "clean air areas," and quantities "significant" in terms of "maximum allowable increases" in the concentrations of certain pollutants. 42 U.S.C. §§ 7471-7473.

circumstances such as those of this case. It is even more unfathomable that Congress fashioned a *comprehensive* . . . policy for the *elimination* of water pollution," *id.*, which sanctions continued pollution once minimum water quality standards have been transgressed.[54] More likely, Congress simply never contemplated that EPA or a state would consider it permissible to authorize further pollution under such circumstances.[55] We will not ascribe to the Act either the gaping loophole or the irrational purpose necessary to uphold EPA's action in this case.

We agree there must be an initial, detectable change in the water quality of a particular body of water for that water to qualify as "degraded."[56] However, in circumstances such as those extant here, we reject any notion that, once water quality standards have been violated (i.e., the quality of the receiving waters has been degraded), the incremental impact of a proposed additional discharge must itself be detectable. Nor is it necessary to demonstrate that the proposed discharge would necessarily increase the frequency of violations. *Contra* Decision on Remand, R., A-33, at 19 ("no credible evidence to suggest that the frequency of [dissolved oxygen] violations would increase due soley to [Fayetteville's] discharge"). Rather, if a body of water is experiencing WQS violations and a proposed new source would discharge the same pollutants to which those standards apply, that source may not be

[54] Indeed, as we saw in the first part of this opinion, the Senate committee was concerned in 1977 that the gains achieved due to the 1977 CWA amendments would be lost in the 1980s if only the 1977 effluent limitations were applied. S.Rep. No. 370, at 42, *reprinted in* 1977 U.S.Code Cong. & Admin.News at 4367. The committee warned that "pressure must be maintained *to assure improved water quality and to avoid slipping back.*" *Id.* (emphasis added).

[55] It appears Congress did consider a variation of this issue, however. *See infra* note 57.

[56] This statement assumes the applicability of regulations comparable to Oklahoma's Beneficial Use Limitations/Anti-Degradation Policy.

permitted if its effluent will reach the degraded waters. Here, Fayetteville's effluent contains phosphorus and nitrogen, each of which impacts several Illinois River water quality criteria—nutrients, turbidity, dissolved oxygen, aesthetics. Violations of at least two of these criteria are already occurring. *See supra* part III.B.2.a. Fayetteville's effluent will be carried downstream to the scenic river. At worst, it will increase the frequency and severity of ongoing violations; at best, it will thwart efforts to bring the river back into compliance with the applicable standards. These factors are sufficient to deny the permit.

We find additional support for our holding in a remedy provided by the Act, which is specific to violations of the permit conditions of publicly owned treatment works such as Fayetteville's plant. Section § 402(h) of the CWA, 33 U.S.C. § 1342(h), provides for "restrict[ing] or prohibit[ing] the introduction of any pollutant into [a publicly owned treatment works that has violated a condition of its discharge permit] by a source not utilizing such treatment works prior to the finding that such condition was violated." According to the D.C. Circuit, this provision authorizes the imposition of a "prospective [sewer] hook-up moratorium." *Montgomery Envtl. Coalition*, 646 F.2d at 587-88. If EPA and the courts have power to establish a moratorium on additional sewer hook-ups to an existing plant in order to clean up the plant's receiving waters, surely the power exists to deny a new permit in order to accomplish the same result. The "great reliance Congress has placed on the permit process as the means of finally achieving water quality standards," *id.* at 588, would indeed be misplaced if the Act were construed to limit the permitting agency to protecting water quality via permit *conditions* only, and not by denying a permit altogether.

The burdensome consequences of denying a permit under these circumstances do not alter our conclusion.

Congress recognized and accepted that there would be economic hardships as a result of requiring compliance with the 1972 and 1977 CWA amendments. *See EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 79-83, 101 S.Ct. 295, 304-06, 66 L.Ed.2d 268 (1980); *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 252 (5th Cir.1989) (it is "Congress' judgment that society must bear such costs [e.g., plant closing and job losses] as the price of achieving the long-term benefits of eliminating pollutants from our nation's waters"). Thus, while it is arguably unfair to "punish" Fayetteville for preexisting dischargers' past failure to comply with WQS—and for enforcement agencies' failure to take action against those dischargers—such a result is not foreclosed by the Act. Indeed, there is no statutory justification for limiting EPA in these circumstances to taking action against the past violators. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 376 (10th Cir.1979) ("It is plainly inconsistent with the strong enforcement policy of the Act to declare the EPA must choose between prevention of future pollution discharges and punishment of past violations. . . . [EPA] needs both sanctions.").

Recognizing EPA's "heavy responsibility in the permit issuing process," the D.C. Circuit has advised the agency that a "watchful role . . . is more appropriate than a timid disinclination to impose any technical requirement that lacks an explicit imprimatur in the statutory language." *Montgomery Envtl. Coalition*, 646 F.2d at 587; *cf.* 1972 U.S.Code Cong. & Admin.News at 3737 ("Federal Government as the custodian of the navigable waters has the *responsibility to control affirmatively* any discharges of pollutants into the navigable waters" (emphasis added)). We concur with that view. Here, the only aspect of exercising EPA's authority to deny an NPDES permit that "lacks an *explicit* imprimatur" in the CWA is the relevance of existing WQS violations.[57]

[57] One provision of the CWA, however, intimates that Congress *did* consider the effect of existing water quality degradation on the

But if EPA is to serve a "watchful role," as we believe it must, surely it is obligated to deny any additional pollution under circumstances such as these. We conclude EPA's express powers and obligations under the CWA necessarily subsume the power to prohibit any new discharge of pollution, regardless of the magnitude of its impact, where the existing quality of the receiving waters does not meet required standards.[58]

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decision whether to permit a new source. The certification statute, which we discussed in the first part of this opinion, contemplates a variation of the circumstances of this case. It provides that a certification obtained for purposes of receiving an NPDES permit also satisfies the certification requirement for any other federal license required for operation of the source *unless* "there is no longer reasonable assurance that there will be compliance with the applicable provisions of [the CWA] because of *changes* since the [certification] was issued *in . . . the characteristics of the waters into which such discharge is made.*" 33 U.S.C. § 1341(a)(3) (emphasis added). The gist of this provision was first enacted in section 11 of the Water and Environmental Quality Improvement Act of 1970, Pub.L. No. 91-224. According to the House Report on the enacted bill, section 11 provided that the first certification was sufficient for additional licenses or permits "if, after notice to the affected State or States . . . no written objection is made to the granting of such license or permit without a subsequent certification." House Rep. No. 127, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.Code Cong. & Admin.News 2691, 2711. The statute further provided that a license or permit could be suspended if a court subsequently found that the licensee or permittee was violating applicable water quality standards. *Id.* We view these sections in the 1970 and 1972 statutes as buttressing our decision today.

[58] It is conceivable that a new discharge of pollution to an already degraded stream protected by the equivalent of Oklahoma's Beneficial Use Limitations regulation *might* be permitted in certain extremely narrow circumstances. This might be permissible where the chemical and physical makeup of the effluent of the new source was unrelated to the standards being violated; for example, where the only potential effect of the effluent was on water temperature (OWQS § 4.1(b)), but the stream was degraded only with respect to toxics (OWQS § 4.3(h)). But where, as here, only the standards being violated are intended to govern constituents of a proposed source's effluent and any amount of that effluent can reasonably be expected to reach the degraded waters, the new discharge may not be permitted.

For all the foregoing reasons, we conclude that EPA's failure to exercise its authority to deny the Fayetteville permit is arbitrary and capricious or otherwise not in accordance with law. Particularly in light of the existing pollution of the Illinois scenic river, the agency's decision is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, and frustrates the policy that Congress sought to implement. *See National Wildlife Federation v. Gorsuch*, 693 F.2d at 171 (citing *Democratic Senatorial Campaign Comm.*, 454 U.S. at 32, 102 S.Ct. at 45). Accordingly, "no amount of deference can save" it. *Id.* Given this conclusion, we do not reach the remaining issues raised by the parties.

We are not unmindful that our opinion may lead the parties to this permit action to consider what recourse may be available to them. We note, first of all, that our opinion in no way affects Fayetteville's right to discharge treated effluent, in accordance with the terms of its permit, to the White River in Arkansas. Beyond that, we note that the Clean Water Act provides a wide array of enforcement options, one or more of which may be available in these circumstances to force improvement of Illinois River water quality and enable compliance with Oklahoma's standards. *See, e.g.*, 33 U.S.C. §§ 1319, 1365. Moreover, as the parties debated in their briefs and at the administrative hearing, technological alternatives to the Illinois River discharge do exist. Having said this, however, we offer no judgment as to the availability, applicability, or efficacy of any of these potential remedies or approaches.

In conclusion, we hold that the Clean Water Act requires point sources to comply with the federally approved water quality standards of affected downstream states. We further hold that where water quality standards violations are already occurring in the receiving waters, no

additional point source discharge to those waters may be permitted if it would contribute to the conditions that produced the violations. Accordingly, we REVERSE EPA's decision authorizing Fayetteville's municipal treatment plant to discharge a portion of its effluent to the Illinois River basin pursuant to the terms of Permit No. AR0020010.

APPENDIX

OWQS § 5, Beneficial Use Limitations, provides in full:

All streams and bodies of water designated as (a) are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3.

All streams designated by the State as "scenic river areas," and such tributaries of those streams as may be appropriate will be so designated. Best management practices for control of nonpoint source discharges should be initiated when feasible. OWQS § 3, Anti-Degradation Policy, provides in full:

The intent of the Anti-Degradation Policy is to protect all waters of the State from quality degradation. Existing instream water uses shall be maintained and protected. No further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed. Oklahoma's waters constitute a valuable State resource and shall be protected, maintained and improved for the benefit of all the citizens.

It is recognized that certain waters of the State possess an existing water quality which exceeds those levels necessary to support propagation of fish, shellfish, wildlife, and recreation in and on the water. These high quality waters shall be maintained and protected unless the State decides, after full satisfaction of the intergovernmental coordination, and public participation provisions of the State's continuing planning process, to allow lower water quality as a result of necessary and justifiable economic or social devolpment. Furthermore, where limited degradation is justified, the State shall require that any new point source of pollution or increased load from an existing point source, protect all existing and attainable beneficial uses through the highest statutory and regulatory requirements, and feasible management or regulatory

programs pursuant to Section 208 of Public Law 92-500 as amended by PL 95-217 for nonpoint sources.

No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in National and State parks, Wildlife Refuges, and those designated "Scenic Rivers" in Appendix A.

As the quality of Oklahoma waters improves, no degradation of such improved waters shall be allowed. When the yearly mean standard for a specific parameter decreases to the point where the goals listed in Appendix E become attainable, degradation will be prohibited by incorporating the goal as a standard.

In those cases where potential water quality impairment associated with a thermal discharge is involved, the anti-degradation policy and implementation method shall be consistent with Section 316 of Public Law 92-500 as amended by PL 95-217.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-9503
89-9507
89-9516

STATE OF OKLAHOMA, *et al.*,
SAVE THE ILLINOIS RIVER (STIR),
STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

ORDER

Filed October 11, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, and THEIS,* District Judge.

The motion of the Arkansas Poultry Federation and the joint motion of the Associated Industries of Arkansas and the Arkansas Federation of Water & Air Users, Inc. for leave to file briefs amicus curiae are granted by the panel of judges who decided the petitions on the merits.

The petitions for rehearing filed by the Environmental Protection Agency, the State of Arkansas, the Arkansas

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* The Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

Department of Pollution Control and Ecology, the City of Fayettville, Arkansas and the Beaver Water District are denied by the panel of judges who decided the petitions on the merits.

Pursuant to Fed. R. App. P. 35(b) the suggestion for rehearing en banc was transmitted to the panel members and the remaining judges in regular active service. No panel member or judge in regular active service having called for a poll, the suggestion for rehearing en banc is also denied.

Entered for the Court

ROBERT L. HOECKER,
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-9503
89-9507
89-9516

STATE OF OKLAHOMA, SAVE THE ILLINOIS RIVER (STIR), STATE OF ARKANSAS,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ORDER

Filed October 31, 1990

Before ANDERSON and BRORBY, Circuit Judges, and THEIS *, District Judge.

The Arkansas parties' motion to stay the mandate pending filing of a petition for certiorari is granted. If a timely petition is filed, the mandate is further stayed pending disposition in the Supreme Court. Fed.R.App.P. 41(b).

Entered for the Court

ROBERT L. HOECKER,
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

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* The Honorable Frank G. Theis, Senior United States District Judge for the District of Kansas, sitting by designation.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-501

ARKANSAS, *et al.*,
Petitioners

v.

OKLAHOMA, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 8th, 1991.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 28th day of December, 1990.

APPENDIX E

Fayetteville, AR 72702

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Mr. Pat Rankin
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Mr. Julian K. Fite
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Mr. Ed Edmondson
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P.O. Box 11
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Re: 89-9503, State of Oklahoma v. EPA
89-9507, Save the Illinois v. EPA
89-9516, State of Arkansas v. EPA

Dear Counsel:

Enclosed is a copy of the opinion of the court in the captioned case. Judgment in accordance with the opinion has been entered today.

Please call this office if you have questions.

Sincerely,

ROBERT L. HOECKER,
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

PF:afw
Enclosure

APPENDIX F

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

NPDES No. AR0020010

In the Matter of:

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR

CITY OF FAYETTEVILLE, ARKANSAS

CLEAN WATER ACT,

NPDES, Interstate Water Pollution, where the record shows that a discharge in one state will not have an undue impact on interstate waters the permit authorizing such discharge should be issued not be denied.

APPEARANCES:

FOR THE STATE OF OKLAHOMA AND OKLAHOMA POLLUTION CONTROL COORDINATING BOARD
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FOR THE ILLINOIS RIVER PROPERTY ASSOCIATION OF ARKANSAS
Jay D. Cole, President
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INITIAL DECISION

PROCEDURAL BACKGROUND

On August 7, 1985, a public permit hearing was held in Fayetteville, Arkansas to receive statements from all interested parties regarding the permit proposed in the public notice published July 6, 1985, on permit number AR0020010, City of Fayetteville, Arkansas. The Oklahoma Attorney General, through Assistant Attorney General Sara J. Drake was present at that hearing and submitted a letter to Ms. Ellen Caldwell dated August 7, 1985, setting out various concerns of the Oklahoma parties. The Attorney General submitted comments relating to technical concerns about the proposed NPDES permit from Roberts/Schornick and Associates. The Attorney General also submitted a report prepared by Roberts/Schornicks and Associates entitled "Illinois River Assessment Report, December 10, 1984."

Subsequent to the public hearing on August 7, 1985, the Environmental Protection Agency (hereinafter "the EPA") issued the final authorization to discharge under the National Pollution Discharge Elimination System (NPDES) on November 5, 1985. That permit authorized the City of Fayetteville, Arkansas to discharge treated sewage effluent in a split discharge into the White River and Mud Creek, Arkansas. Mud Creek is a tributary to the Illinois River which eventually flows into the State of Oklahoma. The discharge into the White River, an intrastate stream, it not involved in this matter.

Special conditions relating to the White River discharge are: no discharge to the White River is permitted unless the stream flow is 60 cfs or more. The permittee is required to operate an industrial pretreatment program.

Special permit conditions are included on the Illinois River basin, including requirements that 30 day average of flow of treated effluent discharge into Mud Creek shall

not exceed 50% of the 30 day average flow of treated effluent from the plant. Also, the 30 day average flow of effluent shall not exceed 6.1 million gallons per day. There is an additional requirement that if the joint Arkansas/Oklahoma/EPA Water Quality Study of the Illinois River basin shows that more stringent limitations for Fayetteville effluent are necessary to ensure that water quality standards are met, then the permit will be modified to incorporate the more stringent limitations, including the potential for a requirement that additional treatment be provided or that Fayetteville's discharge to Mud Creek cease.

On December 6, 1985, the Oklahoma Attorney General filed a request for an Evidentary Hearing on behalf of the State of Oklahoma and the Oklahoma Scenic River Commission, on the subject permit. Save the Illinois River (STIR) also filed a request.

On January 10, 1986, the EPA granted Oklahoma and STIR's request for Evidentary Hearing on the following issues, (1) the factual issue of whether or not the discharge from the City of Fayetteville's NPDES permit will violate the Oklahoma Water Quality Standards; and (2) whether the utilization of technology that is untested at the level of proposed usage by the City of Fayetteville will allow the plant to satisfactorily treat waste water to the levels perscribed by the permit.

On February 14, 1986, the EPA received Oklahoma's Notice of Appeal and Petition for Review, appealing the EPA's determination to deny certain requested issues in the Evidentary Hearing. On February 18, 1986, the EPA received a requested submitted by the Arkansas Attorney General on behalf of the Pollution Control Coordinating Board entitled "Request Be Admitted As A Party".

By Order on May 23, 1986, the EPA denied Oklahoma's petition for rehearing. On July 19, 1986, the EPA, Region VI gave public notice of an Evidentary

Hearing for City of Fayetteville, Arkansas allowing interested persons to file a request to be admitted as a party and to raise any additional issues of fact or law not already raised.

On August 18, 1986, an Order was issued allowing the City of Fayetteville, Arkansas, the Arkansas Department of Pollution Control and Ecology, the Oklahoma Pollution Control Coordinating Board, the Oklahoma Wild Life Federation, and the Beaver Water District to appear as additional parties. The Order also allowed the Citizens Actions for a Safe Environment and the Illinois River Property Association of Arkansas to make a statement for the record. Included in the above Order was a requirement that EPA advise the Court and the parties as to whether or not the Oklahoma non-negredation standard for the Illinois River had been approved by the EPA.

On August 29, 1986, Region VI of the EPA stated that the approved 1982 Water Standards which were in effect at the time of the granting of the NPDES permit in this action includes an "anti-degredation policy" in Section 3 of those Water Quality Standards. That standard states in part that:

> "The intent of the anti-degredation policy is to protect all waters of the state from quality degredation. Existing instream water usage shall be maintained and protected. No further water quality degredation which would interfer with or become injurious to existing instream water usage shall be allowed. Oklahoma's waters constitute a valuable state resource and shall be protected, maintained and improved for the benefit of all citizens. No degredation shall be allowed in high quality waters which constitute an outstanding resource or inwaters of exceptional recreational or ecological significance. These include water bodies located in national and state parks, wide life refuges and those designated "scenic rivers" in Appendix A".

Section 5 of Oklahoma's Water Quality Standards entitled "Beneficial Use Limitations" states:

> "All streams and bodies or water designated as (a) are protected by prohibition of any new point source discharge of waste or increased load from an existing point source except under conditions described under Section 3.
>
> All streams designated by the state as "scenic river areas" and such tributaries of those streams as may be appropriate will be so designated. Best management practices for control of non-point source discharges should be initiated when feasible."

The Illinois River in Oklahoma above the 650 foot elevation level of Tenkiller-Reservoir to the state line with Arkansas is statutorily designated as a scenic river. Following a series of request for documentation and a Motion for Summary Determination or alternatively a Motion to Dismiss, the Evidentary Hearing in this matter was held on August 18 through 20, 1987. At that hearing all parties made available for cross-examination all witnesses for which pre-filed direct and rebuttal testimony had been filed.

Pursuant to the above mentioned Motion for Summary Determination, the Court ordered that the question of whether or not the effluent from the City of Fayetteville's sewage treatment plant would violate the Water Quality Standard's of the State of Oklahoma was allowed and the second issue as the whether or not the technology to be applied by the above mentioned water sewage treatment plant would meet the limitations contained in the permit was dismissed as a issue in this matter. Therefore at the time of the hearing the only issue in controversy was whether or not the effluent from the sewage treatment plant in Arkansas would violate the Water Quality Standard's of the State of Oklahoma.

FACTUAL BACKGROUND

After approximately 40 public hearings, the City of Fayetteville finally determined, after hiring several consultants, to build one sewage treatment plant and split the flow between the White River and an unnamed tributary of Mud Creek. Some of the various alternatives considered were putting all of the effluent into the White River, building two separate sewage treatment plants, land application and a variety of permuntations of the above mentioned alternatives. The permit as currently written requires that the flow from the sewage treatment plant be split equally between the White River and the unknown tributary of Mud Creek which flows for approximately 2 miles before it's confluence with Mud Creek, Mud Creek flows 3 miles prior to it's confluence with Clear Creek, it enters Clear Creek approximately 13 miles up stream of the Illinois River in Arkansas. Upon entering the Illinois River the effluent would then travel approximately 22 miles to the Oklahoma border approximately at the beginning of Lake Frances in the State of Oklahoma. Therefore the treated sewage effluent from the plant would travel approximately 39 miles in the state of Arkansas before it hits the Oklahoma border. In as much as the plant is not in operation, the testimony of the expert witnesses at the hearing consisted of explanations of various mathematical models which the witnesses had constructed to determine the impact of the proposed flow on the water of the State of Oklahoma.

Needless to say it was the conclusion of the Arkansas party's witnesses that the discharge from the Fayetteville, Arkansas water sewage treatment plant would have little or no measurable impact on the water quality of the State of Oklahoma and conversely it was the opinion of the Oklahoma experts that there would be an impact on the water quality of the State of Oklahoma. Before discussing the conclusions of the above mentioned experts it would be helpful to examine the law on this issue

to determine just what the standard is which the Court must apply in making it's final determination in this matter.

APPLICABLE LEGAL STANDARD

Section 401 of the Federal Water Pollution Control Act states that if the Administrator determines that the discharge of a facility may effect the quality of waters of any other state, he shall give notice to such state and if, after following the requirements of the Act, the effected state so requests, a hearing is held under Section 401 on the issue of whether or not the proposed permitted discharge will have an impact on the waters of the receiving state. The statute then goes on to say,

> "such Agency, based upon the recommendations of such state, the Administrator, and upon such additional evidence, if any, presented to the Agency at the hearing, shall condition such license or permit in such manner as may be necessary to ensure compliance with applicable water quality requirements. If the imposition of the conditions cannot ensure such compliance, such Agency shall not issue such license or permit.".

It should be noted that the requirements for public hearing under Section 401 are only triggered if the Administrator or the issuing Agency determines that the discharge will have an adverse impact on the waters of the receiving state. In this instance the Administrator, after evaluating the record, determined that no such impact would exist and therefore notification of the State of Oklahoma was not given and no public hearing under Section 401, as just described was ever had. The hearing which is a subject of this decision was an adjudicatory hearing held pursuant to subpart E of 40 C.F.R. § 124.

The Supreme Court of the United States in the case of *International Paper Company vs. Ouellette*, 107 Supreme Court 805 (1987) in discussing the construction which it

felt applicable to the Federal Clean Water Act stated that in effected states only recourse is to apply to the EPA Administrator who then has the descretion to disapprove the permit if he concludes that the discharge will have an "*undue impact* on interstate waters." Citing the above mentioned Section 401 hearing. I am therefore of the opinion that the standard to be applied in this case is whether or not the discharge will have an undue impact on interstate waters. This conclusion was reinforced by a recent case entitled *Champion II*, 652 Fed. Sup. 1398 (1987) wherein the Court stated that,

> "an effected states water standards are obviously relevant to a determination that discharge would have an undue impact on interstate waters. To hold otherwise would be to thwarth the purposes of the Clean Water Act generally in interstate dispute provision citing the standard in the statute."

The Court went on to say "if the EPA was not permitted to consider the water standards of an effected state there would rarely be an interstate dispute." A careful reading of these two cases, which provide the only guidance known to the writer to exist on what standard one must apply in determining interstate water dispute supports the conclusion that something more than a mere technical violation of the Water Quality Standards must exist and there must be an *undue* impact on interstate waters in order for the subject permit to be denied. The term "undue impact" is not defined by the Supreme Court in *Ouellette* or by the District Court in *Champion II*. Because the Clean Air Act, 42 U.S.C. §§ 7401-7602 is similar in its purposees to the CWA [1], cases construing that legislation should be considered in determining what constitutes "undue impact".

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[1] A major objective of the Clean Air Act Amendments of 1977 was to deal with the problem of interstate air pollution. *Air Pollution Control District of Jefferson, Kentucky v. United States Environmental Protection Agency*, 739 F.2d 1071, 1088 (6th Cir. 1984).

Under the Clean Air Act, the test to be applied in evaluating a petition for interstate pollution abatement is whether the upwind state's emissions "significantly contribute to violations of national ambient air quality standards in a downwind state." *Air Pollution Control District of Jefferson County, Kentucky* v. *United States Environmental Protection Agency, supra*, 739 F. 2d at 1093. "De minimis" impacts on air quality of downstream states from upwind state emissions are not actionable. See *Alabama Power Co. v. Costle*, 636 F. 2d 323, 360 (D.C. Cir. 1979); *Connecticut Fund for the Environment, Inc. v. Environmental Protection Agency*, 696 F. 2d 169, 177 (2d Cir. 1982). Likewise, if a discharge of pollutants in a source state has a *de minimis* impact on water quality in a downstream state, the Court should find no significant contribution to interstate pollution and no undue impact on interstate waters. Therefore I am of the opinion that something more than a mere *de minimis* impact on the affected states water quality standards must exist in order to prohibit the issuance of a discharge permit in the originating state. It should also be noted that pursuant to 40 C.F.R. § 124.85 any party who contends that the denial of the issuance of a permit is improper and invalid shall have the burden of going forward to present an affirmative case at the conclusion of the Agency case on the challenged requirements. That section also states that the permit applicant, in this case the City of Fayetteville, always bears the burden of persuading the Agency that a permit authorizing pollutants be discharged should be issued and not denied and this burden does not shift. The note to that section states that, in many cases, the documents contained in administrative record, in particular, the Fact Sheet or Statement of Basis in Response to Comments should be adequate to discharge this burden. The rather volumnous administrative record in this case along with the testimony offered by the Arkansas parties in my judgment satisfies the burden of persuasion of the applicant and therefore the burden of showing that the permit should not be issued rests upon the Oklahoma parties.

DISCUSSIONS AND CONCLUSIONS

As noted above, the Oklahoma expert witnesses testified that the results of their mathematical modeling studies suggested that there would be some impact on the Oklahoma Water Quality Standards due to the discharge from the Fayetteville sewage treatment plant. However, on cross-examination all of the witnesses testified that in most cases the changes which their models predicted would occur would in a real life situation be practically unmeasurable and undetectible. The other problem associated with the modeling exercises performed by the Oklahoma experts was that they assumed no assimilative capacity of the river in question. The assimilative capacity of a river is a well documented phenomenon and the data which exists in this case, which was measured by several of the witnesses, suggests that this activity is in fact taking place in areas down stream from the sewage treatment plant in areas where sewage discharges are currently occurring. When these two factors are taken into consideration, i.e. (1) that the changes suggested by the Oklahoma witnesses would be in most cases unmeasurable by any known technology, and (2) that the assimilative capacity of the river was not taken into account in their modeling exercises, one must conclude that the adverse affects, if any, which will be produced by the discharge from the Fayetteville sewage treatment plant would be *de minimis* at most and therefore would not constitute the undue impact on interstate waters which the above cited cases suggest is required in order to prohibit or deny the issuance of a permit under Section 402 of the Clean Water Act.

For example, Dr. William Walker, an expert who testified on behalf of the Oklahoma parties stated as follows:

> "Dr. Walker, there is no change or very little change, which you have just told me is not measurable, in chlorophyll-a with Fayetteville's discharge or without Fayetteville's discharge. There is not going to be a measurable difference in water quality in terms of algal growth and the associated problems with taste and odor, turbidity, things like that, will there?"

Answer:

"There will not be a change."

This conversation appears on pages 692 and 693 of the transcript. The testimony of the Oklahoma witnesses on the issue of whether or not there would be a measurable or discernable adverse impact on the non-degredation and other water quality standards of the State of Oklahoma due to the discharge from the Fayetteville sewage treatment plant.

Although it is true that the water quality standards of a receiving state are relevant factors which the Administrator must take into consideration in determining whether or not there is in fact an undue impact on interstate waters, such standards or the violation thereof must be shown to exist in something more than a *de minimis* or minor fashion. This theory and philosophy is reiterated in the "Champion II" case entitled *Champion International Corporation vs. United States Environmental Protection Agency*, 652 Fed. Sup. 1938 (W.D.N.C. 1987) wherein the Court said "Nothing in the regulatory framework surrounding the CWA would automatically require that a source state comply with the water quality standards of every down stream state." The Court then went on to suggest, as I have just done, that the water quality standards of the receiving state are relevant factors in determining whether or not there is an undue impact from interstate waters. The Court further stated,

> "That if the Administrator determines that the discharge levels specified in the permit will have an *undue impact* on interstate waters, he may properly object, regardless of how those levels compare with the water quality standards of the down stream state or the source state." (Emphasis supplied).

All of the above cited Court decisions suggest that in order for a permit to be denied there must be something more than a possibility of violation of down stream water quality standards and that there must be demonstrated and shown that the discharge will have an *undue* impact on interstate waters before such drastic action would be required. This conclusion is supported by the Oklahoma State Department of Health Deputy Commissioner for Environmental Health Services who in a letter dated January 25, 1984, to the Scenic River's Association of Oklahoma stated that:

> ". . . our technical evaluation indicates that no noticable impact would occur if the proposed discharge is treated to the level proposed. That level is equivalent to the most thorough and complete treatment currently available. . . ." (City of Fayetteville Exhibit No. 4)

Based on the volumeous administrative record composed of nine volumes of approximately 2 and ½ inches thick, along with the direct testimony and rebuttal testimony presented by the Arkansas parties to the proceeding, I am of the opinion that the permit applicant has successfully borne the burden of persuading the writer that the permit authorizing the pollutants of discharge should be issued and not denied and that the evidence put forth by the Oklahoma parties was not sufficiently strong to persuade this writer that the permit should be denied or otherwise be invalid. For those readers interested in a more exhaustive description of the testimony of the above mentioned witnesses, their attention is directed to the highly detailed treatise contained in the

300 page brief filed with the Court on behalf of the Beaver Water District which analyses the testimony of all the witnesses in great detail, and in my judgment supports the conclusion hereinabove reached by the Court.

There are several other factors which give the Court additional confidence in the validity of its decision in this matter. They are that several sources of phosphorous in the state of Arkansas will have their phosphorous emissions reduced by approximately 50% when their new sewage treatment plants come on stream in the near future. This factor will substantially reduce the nutrient loading in the Illinois River both in the State of Arkansas and as it crosses the state border into the State of Oklahoma. The other factor is the protective language placed in the permit at the request of the Oklahoma parties to the effect that if the joint study to be conducted between EPA, Arkansas and Oklahoma in the future indicates that there is some significant impact on the water quality of the State of Oklahoma due to the discharge from the Fayetteville water sewage treatment plant into the Illinois River basin that the discharge will either cease or additional treatment will be requirement in order to make it comply with such standards. These two factors add to the weight which I have accorded the testimony of the witnesses in this matter and provide further assurances to the citizens of Oklahoma, in my judgment, that the water quality in their State will not be adversely affected by the discharge from the City of Fayetteville sewage treatment plant.

CONCLUSION

Based upon the entire record in this case, which consists of the Administrative Record, the Testimony and Exhibits of the Witnesses, the Transcript and the Briefs of the Parties, I am of the opinion that the proposed discharge of the sewage treatment plant of the City of Fayetteville, Arkansas will not have an undue impact on interstate waters or violate the applicable water quality standards of the State of Oklahoma. The permit therefore should be issued and not denied.

Dated: 1/12/88

/s/ Thomas B. Yost
THOMAS B. YOST
Administrative Law Judge

APPENDIX G

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

NPDES Appeal No. 88-1

In the Matter of:

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR

CITY OF FAYETTEVILLE, ARKANSAS

NPDES Permit No. AR00200710

ORDER ON PETITIONS FOR REVIEW

The Attorney General of the State of Oklahoma (on behalf of various Oklahoma parties), "Save the Illinois River" (STIR), and the Oklahoma Wildlife Federation have each petitioned for review of a January 12, 1988 Initial Decision upholding an NPDES permit. EPA Region VI issued the permit to the City of Fayetteville, Arkansas, under the Clean Water Act, 33 U.S.C.A. §§ 1251-1376 (CWA), for discharges from the City's sewage treatment plant.[1] Region VI and various Arkansas parties have filed responses opposing the petitions for

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[1] *See* Oklahoma's "Notice of Appeal and Petition for Review" (Feb. 18, 1988); "Petition for Review By Save the Illinois River (STIR)" (Feb. 16, 1988); Oklahoma Wildlife Federation's "Notice of Appeal and Petition for Review" (Feb. 18, 1988).

The Oklahoma Wildlife Federation adopted in full and incorporated by reference the Notice of Appeal and Petition for Review filed by the Oklahoma Attorney General.

review.[2] The three petitions together raise a variety of issues, but only two issues warrant discussion: (1) whether the ALJ properly dismissed the issue of the ability of the new plant technology to ensure compliance with the permit; and (2) whether the ALJ applied the proper legal standard in deciding whether discharges under the permit would violate Oklahoma's water quality standards.

For the reasons set forth below, review of the ALJ's dismissal of the technology issue is denied. I agree with Petitioners, however, that the ALJ applied the wrong legal standard. I am therefore remanding this proceeding for a determination of whether discharges under the permit will result in a detectable violation of the applicable water quality standards. Petitioners' remaining arguments fail to show clear error or that the Initial Decision otherwise warrants review under 40 CFR § 124.91, and I reject them for the reasons set forth in the reply briefs filed by Region VI and the Arkansas parties.[3]

BACKGROUND

On November 5, 1985, Region VI issued an NPDES permit to Fayetteville to discharge treated sewage efflu-

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[2] *See* EPA Region VI Reply Brief to the Petition for Review Filed by Save the Illinois River (STIR) (March 2, 1988); EPA Region VI Reply Brief to the Petition for Review filed by the Oklahoma Attorney General (March 4, 1988); Response of BWD to Notice of Appeal and Petition for Review Filed on Behalf of STIR (March 4, 1988); Response of BWD, the Arkansas Attorney General, ADPC & E, and the City of Fayetteville to Notice of Appeal and Petition for Review filed by the Oklahoma Attorney General (March 8, 1988).

[3] Specifically, I reject Petitioners' arguments regarding the designation of the Illinois River as a scenic river under Oklahoma law; the notice requirements of 33 U.S.C.A. § 1341; the ALJ's conclusions on assimilation; and the ALJ's references to a 1984 letter opinion by the Oklahoma Department of Health, to future pollutant reduction by other dischargers, and to certain protective language in the permit regarding a future joint study of the Illinois River by Arkansas, Oklahoma, and EPA.

ent into the White River and, for the first time, into Mud Creek, a tributary of the Illinois River. The existing NPDES permit authorizes discharge into the White River only. The treated effluent to be discharged into Mud Creek would travel approximately 39 miles in Arkansas before entering Oklahoma. The discharge into the White River is not at issue in this proceeding.

On January 10, 1986, EPA Region VI granted a request by Oklahoma and STIR for an evidentiary hearing and designated two issues to be tried.[4] The hearing was held on August 18-20, 1987, and the ALJ issued an Initial Decision upholding the permit on January 12, 1988. These petitions for review followed.[5]

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[4] The Regional Administrator articulated the issues as follows:

1. The factual issue of whether or not the discharge from the City of Fayetteville's NPDES permit AR0020010 will violate the Oklahoma Water Quality Standards * * *.
2. The utilization of technology that is untested at the level of proposed usage by the City of Fayetteville and issues regarding the plant's ability to satisfactorily treat waste water raised in Fayetteville's own pilot plant study summary.

Letter from D. Whittington, Regional Administrator, U.S. EPA Region VI to S. Drake, Oklahoma Assistant Attorney General (Jan. 10, 1986).

The City of Fayetteville petitioned the Administrator for review of the grant of a hearing on these two issues, but his delegate, a Judicial Officer, held that the Regional Administrator's decision was not subject to review. *See* Order Denying Review, at 4 (May 23, 1986). The Judicial Officer also denied the Oklahoma parties' petitions for review of the Regional Administrator's refusal to designate other issues for hearing. *Id.* at 4-8.

[5] STIR originally moved for reconsideration and reopening of the evidentiary hearing. The Chief Judicial Officer denied the motion because EPA's procedural rules make no provision for such relief. *See* Letter from R. McCallum to E. Edmondson (Feb. 8, 1988).

DISCUSSION

The regulations do not confer an automatic right to review of an initial decision in an NPDES permit proceeding. *See* 40 CFR § 124.91. A petition for review is generally granted only when the initial decision is clearly erroneous (legally or factually) or involves an exercise of discretion or policy that is important and should be reviewed by the Administrator. *Kerr-McGee Nuclear Corporation (Church Rock Facility)*, NPDES Appeal No. 80-3 (May 15, 1980); *Boston Edison Company*, NPDES No. 78-7 (August 28, 1978). The party requesting review bears the burden of demonstrating that review should be granted. *Id.*

A. *The Technology Issue*

The Regional Administrator granted Oklahoma's request for an evidentiary hearing on the issue of whether the new technology to be used at the plant would be sufficient to meet the effluent limits set forth in the permit. Prior to the hearing, Region VI and the Arkansas parties moved for summary determination under 40 CFR § 124.84.[6] By order dated May 13, 1987, the ALJ dismissed the technology issue, stating that "[s]ince EPA cannot order the application of any specific technology, the issue of whether or not the chosen technology will meet the limits imposed by the Permit is not a legitimate permit issue." Order on Motions, at 7 (May 13, 1987). STIR and Oklahoma now request review of this ruling.

Petitioners have failed to show that the ALJ's dismissal of the technology issue is clearly erroneous or otherwise warrants review. From its inception, the heart of the NPDES permit program has been the specification

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[6] Although the Arkansas parties characterized their motion as a "Motion to Dismiss," the ALJ concluded that it was "more akin to a motion for summary determination" and treated it as such. Order on Motion, at 1 (May 13, 1987).

of effluent limits sufficient to ensure various levels of protection,[7] not particular technologies to meet such limits. A preference for this approach is implicit in the terms and structure of the CWA itself, which requires the achievement of "effluent limitations," not the use of specific technologies. 33 U.S.C.A. § 1311(b). The Act's legislative history similarly reflects the desire of the Congress that permittees be free to explore diverse treatment techniques, processes, and equipment. *See, e.g.*, S. Rep. No. 414, 92d Cong., 1st Sess. 59 (1971); H.R. Rep. No. 911, 92d Cong., 2d Sess. 107 (1972). In the words of one commentator, "[t]he rule established * * * in connection with EPA's establishment of effluent standards is clear: The administrator is to set the required effluent levels, and the dischargers are free to meet those levels with whatever technical means are available." R. Zener, *The Federal Law of Water Pollution Control*, in *Federal Environmental Law* 706-707 (ELI ed. 1974).

The ALJ arguably overstated the case in asserting that the Agency has no authority whatsoever under the CWA to order the application of particular technology.[8] As a matter of policy, however, the Agency has routinely declined to specify treatment equipment or techniques in

[7] The CWA requires two basic kinds of effluent limits: water-quality based limits and technology-based limits. *See* 33 U.S.C.A. §§ 1311-18. As applied to publicly owned treatment works like the Fayetteville plant, the technology-based standards are derived by reference to secondary treatment. *Id.* § 1311(b)(1)(B). The only limits at issue in this case are those based on Oklahoma's water quality standards.

[8] For recent, somewhat inconsistent statements on this issue, *compare* Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104, 122 (D.C. Cir. 1987) (EPA empowered "to prescribe as wide a range of permit conditions as the agency deems appropriate in order to assure compliance with applicable effluent limits") *with id.* at 123 (policy to avoid requiring specific technologies is "articulated in the legislative history, although not in the Act itself") *and id.* at 124 (suggesting that "agency may not prescribe technology in specific cases").

NPDES permits. Although the Regional Administrator initially designated the technology issue, the ALJ has the authority to simplify, limit, and strike issues to expedite the hearing. *See* 40 CFR §§ 124.83(c)(1), 124.84, and 124.85(b)(4). By eliminating the technology issue, the ALJ properly exercised his discretion to focus the hearing on the core inquiry compelled by the Act: whether the Fayetteville discharges under the permit will comply with Oklahoma's water quality standards.

Oklahoma and STIR rely on *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568 (D.C. Cir. 1980) (*MEC*), in opposing the ALJ's ruling. *MEC*, however, is distinguishable. That case involved, *inter alia*, an NPDES permit for discharges from the Blue Plains Sewage Treatment Plant into the Potomac River. Public-interest petitioners contended that the plant could not handle the sewage flowing into it during periods of heavy rainfall, and that partially treated or untreated sewage was therefore being discharged into the Potomac. *Id.* at 585. The petitioners requested the EPA to consider adding permit conditions requiring diversion of excess flow to land treatment. *Id.* Although the ALJ excluded evidence on this point, the D.C. Circuit concluded that such evidence was relevant and should have been received. *Id.* at 589. Noting that the CWA requires compliance not only with secondary treatment standards, but also with applicable water quality standards, the Court held that the excluded evidence was necessary to determine whether the permit would ensure compliance with these standards. *Id.*

STIR's allegations regarding the deleted technology issue superficially resemble those addressed in *MEC*, but there is a crucial distinction. In *MEC* the permit itself allowed discharges of untreated sewage through 58 overflow points when flow exceeded plant capacity. *See MEC*, 646 F.2d at 583, 589. Thus, consideration of the land treatment alternative was deemed to be directly within

the scope of deciding whether the permit (in contrast to the plant's technology) assured compliance with applicable water quality standards. Here, however, the permit prohibits any untreated discharges into Mud Creek.[9] By its terms it ensures that excess flow will not violate Oklahoma's water quality standards. Adding a condition specifying land treatment for excess flow would not enhance this protection, but would serve only to limit Fayetteville's choices in dealing with potential excess flow situations.

The purpose of an NPDES hearing is to determine whether the permit comports with the CWA. Speculation that Oklahoma's water quality standards might be impaired by *permit violations* (as opposed to being impaired by *the permit itself*, as in *MEC*) is thus outside the scope of this proceeding. Such concerns are adequately addressed by the EPA's enforcement authority, as well as by the threat of citizen suits under 33 U.S.C.A. § 1365. Even with a land treatment condition in the permit, a city might violate the CWA by discharging untreated sewage into protected water; issuing a permit specifically prohibiting such discharges does not increase the likelihood that such violations will occur.

Moreover, there is no reason to assume that Fayetteville would risk sanctions for noncompliance by discharging incompletely treated excess flow into Mud Creek. Indeed, the December 1987 overflow—evidence of which STIR seeks to introduce in this proceeding—did not result in discharges into Mud Creek, but into White River (which is unaffected by Oklahoma's water quality standards).[10] If capacity at the new plant proves to be

[9] *See* NPDES Permit No. AR0020010, Part III, Section A.2.b (Nov. 5, 1985) ("Effluent which has not received complete treatment * * * shall not be discharged to Mud Creek * * *. During periods of short-term noncompliance with effluent limitations ('upsets'), no effluent shall be discharged to Mud Creek.")

[10] *See* STIR's "Motion for Reconsideration and Reopening Evidentiary Hearing" (Exh. B) (Jan. 28, 1988).

a serious problem, Fayetteville might well have to consider alternative technologies to comply with the permit. It is unnecessary, however, to explore the excess flow issue in this proceeding because the permit as written does not jeopardize Oklahoma's water quality standards insofar as excess flow is concerned.[11]

B. *The Proper Legal Standard*

The basic issue in this case is whether the Fayetteville discharge will violate Oklahoma's water quality standards.[12] The ALJ held that the appropriate legal stand-

[11] In arguing that the ALJ improperly deleted the technology issue, STIR contends that he also wrongly excluded evidence regarding affiliations between the corporation that designed the plant and the corporation that will operate the plant. Even if the technology issue had been retained, however, it would be difficult to discern the relevance of these corporate ties. The ALJ committed no error in excluding this evidence.

Prior to his deletion of the technology issue, the ALJ refused to add an issue regarding whether land treatment "must be utilized as the most environmentally sound method of treatment to protect both the Illinois and White Rivers." Order, at 2 (Sept. 17, 1986). Oklahoma requests review of this ruling, arguing that because the new plant technology is inadequate to meet the permit effluent limits, the land treatment alternative should have been explored at the hearing. As discussed above, however, the only genuine issue in this proceeding is whether the effluent limits and other conditions in the permit are sufficient to protect the water quality standards. Because the technology issue was properly deleted, evidence regarding land treatment is likewise irrelevant.

[12] Oklahoma's EPA-approved water quality standards include a narrative "anti-degradation policy," which provides:

> The intent of the Anti-degradation Policy is to protect all waters of the State from quality degradation. Existing instream water uses shall be maintained and protected. No further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed. Oklahoma's waters constitute a valuable State resource and shall be protected, maintained and improved for the benefit of all the citizens.
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> * * * *

[Continued]

ard was not one of strict compliance with these standards, but rather "whether or not the discharge will have an *undue impact* on interstate waters." Initial Decision at 8 (emphasis added). In adopting this test, the ALJ relied on dicta from *International Paper Co. v. Ouelette*, 107 S. Ct. 805 (1987), which states that the Administrator may disapprove a state-issued permit if he concludes that it will have an "undue impact on interstate waters." *Id.* at 811. Noting that the Supreme Court did not define "undue impact" in *Ouellette*, the ALJ turned to cases interpreting the Clean Air Act (CAA) to determine the meaning of this phrase. This led him to conclude that a de minimis exception, applied under the CAA, should also be applied under the CWA. Initial Decision at 9. STIR and Oklahoma argue that the ALJ's reliance on *Ouellette* and on case law under the CAA was clearly erroneous. I agree.

The CWA requires an NPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards: [13]

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[12] [Continued]

> No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in National and State parks, Wildlife Refuges and those designated "Scenic Rivers" in Appendix A.

EPA's Statement Regarding Status of Water Quality Standards (Attachment) (August 29, 1986). The Illinois River at the Oklahoma/Arkansas state line is designated as a scenic river under Oklahoma law. Initial Decision at 5.

[13] Because this case involves an interstate dispute, and because of the preemptive effect of the CWA on state law, the only applicable water quality standards are those that have been approved by the EPA under the CWA. *See* Illinois v. City of Milwaukee, 731 F.2d 403, 413-14 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 980 (1985). Thus any water quality standards that have not been federally approved are irrelevant here. In cases that do not involve interstate disputes, however, the source state may impose more stringent non-EPA-approved water quality standards in NPDES permits under 33 U.S.C.A. § 1370. *Id.*

> In order to carry out the objective of this chapter there shall be achieved * * * any more stringent limitation, including those necessary to meet water quality standards * * * established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) * * * or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C.A. § 1311(b)(1)(C).[14] The meaning of this language is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility.[15] More to the point, it calls for greater protection of water quality than the Supreme Court's "undue impact" dicta implies.

Nonetheless, a mere theoretical impairment of Oklahoma's water quality standards—*i.e.*, an infinitesimal impairment predicted through modeling but not expected to be actually detectable or measurable—should not by itself block the issuance of the permit. In this case, the permit should be upheld if the record shows by a preponderance of the evidence that the authorized discharges would not cause an actual *detectable* violation of Oklahoma's water quality standards.[16]

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[14] *See also id.* § 1341(a)(2) ("[i]f the imposition of conditions cannot insure such compliance [with applicable water quality standards] such agency shall not issue such license or permit.") EPA's regulations likewise provide that no permit may be issued when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states. 40 CFR § 122.4(d).

[15] *See* United States Steel Corp. v. Train, 556 F.2d 822, 838 (7th Cir. 1977) ("[T]he states are free to force technology * * *", and "[i]f the states wish to achieve better water quality, they may [do so], even at the cost of economic and social dislocations * * *.")

[16] The element of detectability is implied in EPA's regulations, which specify the conditions that must appear in an NPDES permit. For example, 40 CFR § 123.44(c) states that one of the

It would be improper, however, to characterize the required showing as implying the existence of either an "undue impact" or "de minimis" test. The phrase "undue impact" wrongly implies a reasonableness standard, *i.e.*, that violations of water quality standards may be tolerated if justified by the totality of the circumstances. The phrase "de minimis" incorrectly suggests that only "significant" violations are prohibited. The showing that must be made here implies neither a reasonableness standard nor a significance test, but instead is directed at the quantity and quality of the evidence relating to whether a violation would occur.

The ALJ's reliance on the "undue impact" and "de minimis" standards was not only inconsistent with the CWA, but was also a misapplication of precedent. *Ouellette*, from which he derived the "undue impact" standard, was a common-law nuisance action in which Vermont landowners sued a New York paper mill discharging pollutants into Lake Champlain. 107 S. Ct. at 807. The specific requirements of the CWA as they relate to NPDES permits were not directly at issue. Admittedly, the Court stated in dicta that the Administrator may

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grounds on which EPA may object to a state-issued NPDES permit is that "[t]he permit fails to * * * ensure compliance with any applicable requirement * * *." In interpreting this language, one court observed: "Clearly, unless there is some method for measuring compliance, there is no way to ensure compliance." Champion International Corp. v. North Carolina, 648 F. Supp. 1390, 1395 (W.D.N.C. 1986) (*Champion I*). The court upheld EPA's objection to a state-issued NPDES permit on grounds that the permit failed to include the methodology for judging compliance (specifically, compliance with an effluent limitation designed to ensure compliance with a narrative state water quality standard for color). There are similar regulations for EPA-issued NPDES permits. *E.g.*, 40 CFR § 122.43(a) (permits shall contain "conditions * * * to provide for and assure compliance with all applicable requirements * * * and regulations"); 40 CFR § 122.44(i) (permits shall include "monitoring requirements * * * [t]o assure compliance with permit limitations * * *.")

disapprove a state-issued NPDES permit under 33 U.S.C.A. § 1342(d)(2) if he concludes the discharges will have an "undue impact" on interstate waters. *Id.* at 811. This dicta, however, was not an attempt at a precise definition of a specific substantive standard under the Act, but was merely a loose characterization of the procedures in Section 1342 that allow an affected state to object to a proposed NPDES permit. (Indeed, the dicta in no way suggests that the Administrator is powerless to disapprove a permit if the discharge would have *less* than an "undue impact" on interstate waters.) The ALJ's extension of the *Ouellette* dicta to the instant case is in direct conflict with the clear language of Section 1311(b)(1)(C), which requires achievement of effluent limitations necessary to meet applicable water quality standards. While statements made by the Supreme Court, even in dicta, should not be lightly ignored, neither should they be taken out of context and used to dilute express statutory requirements.[17]

Regarding the ALJ's use of CAA case law, he correctly observed that the CAA and the CWA have a similar goal, namely, protection of the environment; however, the de minimis standard used under the CAA is based on statu-

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[17] The ALJ also cited the case of Champion International Corporation v. EPA, 652 F. Supp. 1398 (W.D.N.C. 1987) (*Champion II*), as reinforcing his interpretation of *Ouellette*. In *Champion I*, 648 F. Supp. 1390 (W.D.N.C. 1986), North Carolina and permittee brought an action challenging EPA's assumption of North Carolina's NPDES permitting authority. The Court ruled in EPA's favor in part because the permit failed to require compliance with the water quality standards of Tennessee, an affected state. *Id.* at 1399. In *Champion II* the court merely held that nothing in *Ouellette* required modification of its holding in *Champion I*. 652 F. Supp. at 1399-1400. Although the court did mention the *Ouellette* "undue impact" dicta (*id.*), it did so without extensive analysis of the statutory requirements. To the extent *Champion II* can be read as applying the undue impact standard, it is in direct conflict with the clear language of the Act, and I decline to follow it in this case.

tory language strikingly different from that in the CWA. The CAA requires each major new source to notify nearby states only where it "may *significantly* contribute" to pollution in excess of national ambient air quality standards outside the source state. *See* 42 U.S.C.A. § 7426(a) (emphasis added). In contrast, the CWA requires unequivocal compliance with applicable water quality standards of an affected state. *See* 33 U.S.C.A. § 1311(b)(1)(C).

Unfortunately, I cannot treat the ALJ's use of the "undue impact" and "de minimis" standards as harmless error. In his Initial Decision, he stated that the permit's impact on Oklahoma's water quality would be immeasurable "in most cases." [18] If he had found that the impairment would be immeasurable in all cases, it would be unnecessary to remand the case. As written, however, the Initial Decision suggests that in some cases the impairment might be detectable, thus violating the Act.

Applying the proper standard on remand, the ALJ should decide whether the permit will result in a detectable violation of the applicable water quality standards. Due to the conflicting testimony in this case, it is important for the ALJ to provide detailed findings. The ALJ should identify which applicable water quality standards, if any, would be violated by the permitted discharge. At a minimum, the ALJ should expressly determine whether the permit must be conditioned to prevent water quality standard violations during periods of low flow. *Cf.* Transcript pp. 369, 432-33, 702-03. He should also explicitly decide whether nitrogen and phosphorus in the discharge will measurably degrade Oklahoma water quality. If so, he should also consider whether any conditions can be added to the permit to protect Oklahoma's water quality standards.

[18] Initial Decision at p. 10. The ALJ stated:

> [T]he Oklahoma expert witnesses testified that the results of their mathematical modeling studies suggested that there would be some impact on the Oklahoma Water Quality Standards due to the discharge from the Fayetteville sewage treatment plant. However, on cross-examination all of the witnesses testified that in most cases the changes which their models predicted would occur would in a real life situation be practically unmeasurable and undetectible.

Ordinarily, the grant of a petition for review results in further briefing on appeal to facilitate full review. Here, however, it is unlikely that additional briefing on the proper legal standard would alter the ultimate disposition of this issue. Therefore, no briefing schedule will be set at this time. The parties will have the opportunity to petition for review of the ALJ's decision on remand. If they so desire, they can fully brief the legal standard issue at that time.

In the interest of a prompt resolution of this case, the ALJ is directed to issue a decision on remand within 60 days of the date of this order. If more time is needed, he may request an extension from the Chief Judicial Officer for good cause shown.

So ordered.

/s/ Mary Jane Agnew for
RONALD L. MCCALLUM
Chief Judicial Officer

Dated: June 28, 1988

APPENDIX H

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY

NPDES Appeal No. 88-1

In the Matter of:

NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM PERMIT FOR

CITY OF FAYETTEVILLE, ARKANSAS

NPDES Permit No. AR00200710

DECISION ON REMAND

This matter is before me on a Remand issued by the Judicial Officer on the basis that in my Initial Decision, previously issued, I utilized the wrong standard in deciding the case. The Judicial Officer ruled that use of an "undue impact" and "de minimis" standard was improper under the terms of the Clean Water Act. The Judicial Officer also instructed me as follows:

> "Applying the proper standard on remand, the ALJ should decide whether the permit will result in a detectable violation of the applicable water quality standards. Due to the conflicting testimony in this case, it is important for the ALJ to provide detailed findings. The ALJ should identify which applicable water quality standards, if any, would be violated by the permitted discharge. At a minimum, the ALJ should expressly determine whether the permit must be conditioned to prevent water quality standard violations during periods of low flow. *Cf.* Transcript pp. 369, 432-33, 702-03. He should also explicitly decide whether nitrogen and phosphorous in the discharge will measurably degrade Oklahoma water quality. If so, he should also consider whether any conditions can be added to the permit to protect Oklahoma's water quality standards."

There is also before me a Motion filed on behalf of STIR seeking Reconsideration and Reopening the Evidentiary Hearing. This Motion is DENIED because its attempts to explore the issue of plant technology and operation which was excluded from this proceeding by the Court in a Pre-Hearing Order which was upheld by the Judicial Officer at page 9 of his Order. Additionally, the Rules of Practice applicable to these proceedings make no provision for such relief. (See Footnote No. 5 of the Judicial Officer's Order.)

Although not wishing to engage in a battle of semantics with the Judicial Officer, my notion of the use of the *de minimus* principal is in accord with his position on the proper standard to be used in reviewing the record in this matter, "*i.e.*, an infinitestimal impairment perdicted by modeling but not expected to be actually detectable or measurable."

Before discussing the question of whether or not any Oklahoma standard will be violated when the treatment plant comes on line, it is necessary to address several legal threshold issues proffered by the Arkansas parties.

The first question presented is which of Oklahoma's water quality standards apply to this case. The Arkansas parties argue that the 1982 standards should apply. In support of this position they say that the facility was designed, tested and built to meet the 1982 standards and it would not be proper or fair to now decide that the 1985 standards must be met. They argue that the permit was issued based upon compliance with the 1982 standards, which were the only ones in effect, and in fact the 1985 standards were only approved after the hearing in this matter had been proceeding for several months.

No authority to support this position was provided, relying instead on basic notions of equity and fairness. Although I sympathize with the equitable argument proffered, I am of the opinion that the facility must meet the water quality standards in effect at the time of the commencement of its operation, *i.e.*, the 1985 standards.

The Arkansas parties also contend that the Oklahoma "beneficial use" or "new source" standard does not and cannot apply to a discharge in the state of Arkansas. They argue that any other construction would be contrary to the plain meaning of the Oklahoma water quality standards (W.Q.S.). In support of this position they direct my attention to the definition of "waters of the State of Oklahoma" contained in Section 2 of the 1982 and 1985 W.Q.S. which states that such waters are defined as "[A]ll streams, lakes . . . and all other bodies or accumulations of water *which are contained within, flow through, or border upon this State* or any portion thereof . . ." (emphasis supplied). Based upon this definition they contend that the standards are only applicable to waters *within* the State of Oklahoma and cannot apply to a new point discharge into tributaries such as Mud Creek and Clear Creek which are not contained within, flow through, or border the State of Oklahoma.

They argue that to allow such standards to apply to a discharge in the State of Arkansas would violate the Clean Water Act (CWA) for two reasons. First, the Act requires all states to adopt W.Q.S. applicable to *intrastate waters.* (33 U.S.C. § 1313(3)(A)) Citing this authority they say that Oklahoma has no authority to enact W.Q.S. that apply to waters outside the State of Oklahoma. Second, under the CWA, affected states may not establish a separate permit system to regulate an out-of-state source, but may only establish a permit system for waters within its jurisdiction, (33 U.S.C. § 1342(b)); *State v. Champion International Corp.*, 709 S.W. 2d 569 (Tenn. 1986). They then argue that to allow the State

of Oklahoma to impose its "no new point source discharge" standard on a discharge in another state is, in effect, allowing the State of Oklahoma to establish a separate permitting system for discharges in another state, a position contrary to the intent and purposes of the CWA.

The Arkansas parties also argue that a plain reading of the 1985 Beneficial Use Limitation is inapplicable to the Fayetteville discharge. That section states that:

> "All streams and bodies of water designated as (a) in Appendix A are protected by prohibition of any new point source discharge which increases pollutant loading or increased load from an existing point source. All stream segments designated in Appendix A as "scenic river" and the tributaries of those stream segments are designated as (a) . . ." (Section 7.11. 1985 W.Q.S.)

They contend that since the tributaries into which Fayetteville proposes to discharge are not located in the State of Oklahoma, that the standard does not on its face apply to a point source that originates in another state.

As to the CWA arguments, *supra*, I am of the opinion that they must fail. It is clear that an out-of-state source must meet the W.Q.S. of another downriver state. See § 401(a)(2) of the CWA; 40 C.F.R. §§ 122.4(D) and 122.44(d)(4); *International Paper Co. v. Oullette*, 93 L.Ed. 883 (1987). Therefore the Fayetteville discharge must meet Oklahoma's W.Q.S. as they exist at the border of the two states. I further find that such W.Q.S. do not amount to an attempt to establish a separate system for out-of-state sources since they apply equally to Oklahoma sources. No separate standards applying only to out-of-state sources has been established by Oklahoma.

As to the Arkansas parties argument that the Beneficial Use Limitations do not apply to the Fayetteville discharge, it too must be rejected. To accept such an argument would violate the principals set out above since it is premised on the notion that such standards only apply to sources located in the State of Oklahoma. There is no factual issue among the parties that the Illinois River at the border of the two states is a Class (A) River and therefore the standards applicable to pollution crossing that border must comply with Oklahoma's W.Q.S. as they exist at that point. Any other interpretation would allow a source to locate its discharge just across the line in Arkansas and freely violate the Oklahoma standards. Such a result is contrary to the above-cited statutes, regulations and Court decisions.

I will now address the issue as to whether or not the Fayetteville discharge will violate the relevant Oklahoma standards using the interpretation mandated by the Judicial Officer's Remand.

The 1985 Beneficial Use Limitation, cited above, does not define "Pollutant Loading" but the O.W.Q.S. do define "Pollution" as follows:

> "Contamination or other alteration of the physical, chemical or biological properties of any natural waters of the State, or such discharge of any liquid, gaseous or solid substance into any waters of the State as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life. (82 O.S. 1981, section 926.1(1).)"

Using this definition, the Oklahoma parties must show by substantial evidence that the City's discharge will create a nuisance or render the Illinois River in Oklahoma

harmful, detremental or injurious to any beneficial use of the river. I will now inspect the various W.Q.S. to determine if the City's discharge will cause the 1985 Beneficial Use Limitation to be violated.

NUTRIENTS

Section 7.10(b) of the Oklahoma W.Q.S. provides that:

> "[T]he total phosphorus concentration and the nitrogen/phosphorus concentration ratio will not be increased to levels which result in man induced eutrophication problems."

Nutrients are defined as "[e]lements of compounds essential as raw materials for organisms growth and development; these include carbon, oxygen, nitrogen and phosphorus."

Eutrophication is defined as:

> "[T]he normally slow aging process by which a lake evolves into a bog or marsh and ultimately assumes a terrestrial state. During eutrophication the lake becomes so rich in nutritive compounds (especially nitrogen and phosphorus) that algae and other microscopic plant life become superabundant, thereby "chocking" the lake, and causing the lake to advance in serial stages."

It is therefore apparent that the W.Q.S. require a showing that the increases in phosphorus concentrations and phosphorus/nitrogen ratios attributable to the City's discharge will cause eutrophication problems in lakes located in Oklahoma. In this case we are only concerned with Lake Francis and Lake Tenkiller and not with free flowing streams in Oklahoma.

The new plant in Fayetteville is required by the permit at issue here to limit its discharge of phosphorus to one milligram per liter per day. Based upon the average daily flow of the plant of 7.0 mgd its discharge to Mud

Creek will be 3.5 mgd when it comes on line and at design capacity in the year 2005 it will release 6 mgd into Mud Creek.

The Arkansas parties argue with some vigor that the Oklahoma witnesses have not taken into account the additional reduction in phosphorus discharges into tributaries of the Illinois River by some cities in Arkansas which are in the process of constructing new sewage treatment plants. They conclude that at the present, without the proposed Fayetteville discharge, approximately 750 lbs. per day of phosphorus is discharged by Arkansas entities into the Illinois River basin. The sources are the cities of Springdale, Rogers and Siloam Springs in Arkansas. When the Fayetteville plant comes on line it will contribute 30 lbs/day of phosphorus and in the year 2005, 55 lbs/day. They say that the record reflects that when all of the new plants come on line there will be 54% reduction of total phosphorus loading to the Illinois River basin (Arkansas ex. No. 1, pp. 5-6; Arkansas ex. No. 4, p. 8). They argue that, in view of these large reductions in nutrients, there cannot be any measurable eutrophication in Lake Francis or further downstream in Lake Tenkiller. They argue that since the Oklahoma nutrient standard only prohibits *increases* on total nutrients that will then cause eutrophication in lakes, there can be no violation of the nutrient standard because of the 54% decrease in nutrients entering the River system. I will address this argument later.

The Arkansas parties also argue that the standard will not be violated due to the assimilation of nutrients both above and below Lake Francis. The 1985 O.W.Q.S. define assimilation as "[T]he amount of pollution a stream can receive and still maintain the W.Q.S. designated for that stream." (Oklahoma ex. No. 6. p. 95). The mechanisms that are involved in the assimilation process are found at pp. 308 and 319 of the Transcript.

The argue that the increase in flow to the River system resulting from the City's discharge will increase the assimilative capacity of the system by enlarging the ecosystem. The record reflects that this phenomenon is most effective at periods of low flow in the involved rivers and creeks. (p. 309 Transcript). Since low flows tend to occur during the summer months when the growth of algae are of the most concern, the assimilative processes is at its most effective stage and therefore removes more nutrients upon which the algae feed before they reach the Oklahoma border. Of the total nutrients contained in the Fayetteville discharge, it is estimated that only 20-25% would be available by the time it reaches the Oklahoma border (pp. 311-312 Transcript). Therefore of the approximately 30 lbs. of phosphorus released, only 6 lbs/day would be bio-available to organisms over the Oklahoma border.

Other studies reinforce the existence and magnitude of the assimilative capacity of the River system in Arkansas prior to reaching the border with Oklahoma. The ADPC and E modeling shows a 70 to 75% reductions in phosphorus in the River basin system prior to the Oklahoma border. (Arkansas ex. No. 4, p. 8; p. 315 of Transcript). Dr. Thompson testified that the addition of Fayetteville's effluent would only increase the total phosphorus loading to Lake Francis by 2.4%. (Fayetteville ex. No. 3, p. 2). The record also reflects a substantial amount of assimilation in the 50 mile stretch of the Illinois River between Lake Francis and Lake Tenkiller. A survey of this River portion done by Oklahoma for the years 1975-1977 reflect an 80% reduction of phosphorus and a 70% reduction in nitrogen between these two points.

There is a lack of substantial evidence to support the notion that the small increases in phosphorus or the nitrogen/phosphorus ratios would result in an increase in eutrophication of the lakes involved.

Page 369 of the Transcript, to which the Court's attention was directed by the Chief Judicial Officer (CJO), involves the testimony of Dr. Threlkeld, an Oklahoma expert witness, wherein he postulates that it would be *theoretically* possible to measure the 30% increase in phosphorus loading to Lake Francis caused by the City's discharge. In my opinion, mere theoretical measurements alone do not constitute proof and in any event Dr. Threlkeld could not testify that this increase would increase the levels of euthrophication of the Lake presently occurring. The same is true as to the testimony of Dr. Schornick, another Oklahoma expert, which appears on pages 432-33 of the Transcript. The testimony is flawed for two reasons. Firstly, it is based upon an assumption that the treatment plant will release water containing a 1.8 mpd of phosphorus which is almost twice the amount mandated by the permit, *i.e.*, 1 mpd. Secondly, the witness in testifying that it would be possible to measure this inflated amount of phosphorus, testified on page 433 that under both low and high flow scernarios such measurement amounted to mere "*speculation*" on his part. I am therefore of the opinion to assign no substantial weight to this testimony. Additionally, Dr. Schornick could not testify that the minute increases involved would violate the Oklahoma W.Q.S. by causing an increase in man-induced eutorphication in the Lake. I am of the opinion that the mere likelihood of being able to measure a difference alone is insufficient to show a violation absent a showing that such increases will cause increased eutrophication.

The Court's attention is also directed to the testimony of Dr. Walker, appearing on pages 702-703 of the Transcript. In this portion, Dr. Walker testifies that one could not measure the increases in phosphorus which his modeling perdicted. He did however say that one could measure an increase in nitrogen. The increase which he spectulated would occur, allowing for a 50% assimilation rate, was 300 parts per billion, clearly a minute change.

Dr. Walker then ventured into areas outside of his field of expertise by positing that this would violate the Oklahoma W.Q.S. since it demonstrated a measurable increase. As I indicated earlier, a mere measurable increase alone is not sufficient to cause a violation of the standard. This notion is reinforced by Dr. Walker's earlier testimony at pp. 692-93 of the Transcript wherein he testified that such increases would *not* cause a change in algae growth, taste, odor or turbitidy. Another problem with Dr. Walker's testimony is that the parameter which he said could be measured was nitrogen and not phosphorus. The record reflects that it is phosphorus availability and not nitrogen which controls the algae growth in the River system. See the testimony of Dr. Gakstatter and the intensive survey of the Illinois River (1985). Dr. Gakstatter was not cross-examined by the Oklahoma parties and his testimony was unrefuted by other witnesses.

Dr. Schornick was of the opinion that Lake Francis no longer acts as a nutrient trap (Transcript pp. 423-24). However, the data and reports included in his testimony indicate (1) that there is a substantial decrease in phosphorus above as compared to immediately below Lake Francis and (2) that in the 55 mile stretch of River from Lake Francis to Lake Tenkiller, additional assimilation of phosphorus takes place at a substantial rate. On cross-examination Dr. Schornick admitted that all of the phosphorus below Lake Francis would be assimilated out by the time it reached Lake Tenkiller (Transcript pp. 466-67).

Dr. Walker's testimony on the increase in phosphorus in Oklahoma resulting from the Fayetteville discharge are flawed because he failed to take into account any assimilation thereof either in Arkansas or Oklahoma. Additionally, Dr. Walker's Basin Wide Mass Balance Calculations in Tables 5, 6 & 7 are based upon the output of the plant in the 20 year design flow in 2005 and do not

apply to the year the permit actually goes on line. Although the Arkansas parties did not specify when the new treatment plants at the three Arkansas cities will come on stream, the implication was that it would be imminent. There is no doubt however that they will be on line by the year 2005 and none of the Oklahoma witnesses took into account the large phosphorus reductions associated therewith in their calculations. Based upon Dr. Walker's own figures which did not take into account any assimilation or reduction in loadings after 1988, as noted above, he was unable to testify, without qualification, that there would be any measurable violation of Oklahoma's W.Q.S. as they relate to nutrients.

The small percentage increases which Dr. Walker perdicted would occur, would, according to Dr. Gakstatter, be obscured by natural variations and users of the river will perceive no difference in water quality after Fayetteville begins discharging.

I am therefore of the opinion that based upon consideration of the entire record the discharge of the City of Fayetteville will not cause a violation of the Oklahoma W.Q.S. as they relate to nutrients during either high or low flow River conditions.

AESTHETICS

Section 7.10 of the Oklahoma 1985 W.Q.S. defines the Beneficial Use of Aesthetics as follows:

> "[t]o be aesthetically enjoyable, the waters of the State must be free from floating materials and suspended substances that produce objectionable color and turbidity. The waters must also be free from noxious odors and tastes, and from materials that settle to form objectionable deposits, and discharges that produce undesirable or nuisance aquatic life."

Section 7.10(a) of the 1985 W.Q.S. provides as to color that:

> "waters of the State shall be virtually free from all coloring materials which produce an aesthetically unpleasant appearance. Color producing substances, from other than natural sources, shall be limited to concentrations equivalent to 70 color units."

Section 4.10(b) of the 1982 O.W.Q.S. Turbidity, under the beneficial use of aesthetics, provides:

> "[t]urbidity from other than natural sources shall be restricted to not exceed the following numerical limits:
>
> (1) Warm Water Streams—50 Nephelometric Turbidity Units.
>
> (2) Warm Water Lakes—25 Nephelometric Turbidity Units.
>
> (3) Cold Water Streams—10 Nephelometric Turbidity Units.
>
> In waters where background turbidity exceeds these values, turbidity from point sources shall be restricted to not exceed ambient levels. Unless due to purely natural or non-man induced conditions the turbidity levels may reasonably be expected to decrease as management of man induced nonpoint sources occur. These nuumberrs apply to normal stream flow conditions with turbidity levels up to seven days after high flow event to be decided on a case by case basis."

(Oklahoma Ex. No. 6(a), p. 10, section 4.10(a), 1982 O.W.Q.S.).

Under the 1985 O.W.Q.S., the section Turbidity has been moved from the beneficial use of Aesthetics to the beneficial use of Fish and Wildlife Propagation and renumbered as section 7.3(m). The only substantial changes in the section is that Cold Water Streams with the numerical limit of 10 Nephelometric Turbidity Units,

states that those streams are the ones designated as small-mouth bass fisheries or trout fisheries. (Oklahoma Ex. No. 6, p. 19, section 7.3(m), 1985 O.W.Q.S.).

Section 7.10(c) of the 1985 W.Q.S. define the Beneficial Use of Solids as follows:

> "[t]he waters of the State shall be maintained so as to be essentially free of floating debris, bottom deposits, scum, foam and other materials, including suspended substances of a persistent nature, from other than a natural source".

Section 7.10(d) of the 1985 W.Q.S. for the Beneficial Use of Taste and Odor provides:

> "[t]aste and odor producing substances from other than natural origin shall be limited to concentrations that will not interfere with the production of a potable water supply by modern treatment methods or produce abnormal flavors, colors, tastes and odors in fish flesh or other edible wildlife or result in offensive odors in the vicinity of the water, or otherwise interfere with beneficial uses.

[illegible] reading of the record shows that the only compound of the City's discharge that would result in a violation of the above-quoted standards is nutrients. Since I have already concluded that the nutrient standard is not violated, it logically follows that the aesthetic standards will also not be violated.

The testimony of both the Oklahoma and Arkansas experts appear to demonstrate that no discernible violation of these aesthetic standards will occur because of the City's discharge.

The testimony of Dr. Walker, Oklahoma's primary expert witness, shows, as quoted above, that there will be no change in terms of algae growth, taste, odor and turbidity.

Dr. Gakstatter, whose testimony was not subjected to cross by the Oklahoma parties, testified that recreational users of the River basin would not be able to discern any change in the above cited standards. He also testified that any observable changes down stream from Lake Francis, to the extent they might be discerned, are caused by naturally occurring clay sediments in the Lake being re-entrained in the water column due to water flow and that such naturally occurring problems would clearly obscure any effects of the City's discharge (1985 intensive survey of the Illinois River in Arkansas and Oklahoma pp. 64-65; Transcript p. 681).

Dr. Cliff Thompson was also of the opinion that the City's discharge would not violate the Beneficial Uses of the River and there was no reason to believe that such discharge would violate the above-mentioned aesthetic standards or that there would be a measurable impact on any such parameters (pp. 255-56, 284, 287, 246-47, 282 of the Transcript).

The Oklahoma State Department of Health wrote in Fayetteville ex. no. 4, that there would be no noticeable impact on water quality in the Illinois River because the level of treatment at the City's plant was equivalent to the most thorough and complete treatment available.

Although Dr. Walker, in his pre-filed testimony, was of the opinion that the City's discharge would increase the spatial and temporal violation frequencies of the nutrient, dissolved oxygen, turbidity and solids water quality standards in Oklahoma, the data associated with such testimony did not support these conclusions. (Oklahoma ex. No. 8, p. 1 summary). These conclusions were also not deemed to be correct in the opinion of Dr. Gakstatter, who testified that although such assessments by Dr. Walker might be *theoretically* correct, from a practical stand point it would be difficult, if not impossible, to sufficiently demonstrate increased violation frequency due to the City's discharge (EPA ex. No. 4, p. 2).

Figure 21 of Dr. Walker's testimony, which contains bar graphs showing the predicted changes associated with the City's discharge show little or no change in the parameters involved and would, in any case, be obscured by naturally occurring variations (Gakstatter testimony p. 2). In addition, Dr. Walker, on cross-examination, testified that these predicted changes could not be perceived or measured (pp. 689 & 711, Transcript). This is true for low and average River flow conditions (p. 613, Transcript). If an aesthetic change cannot be seen or measured, there can be no violation.

The same conclusions apply to Dr. Schornick's testimony. His testimony, in this regard, suffered the same flaws as pointed out above under the discussions regarding nutrients. Dr. Schornick was of the invalid opinion that if theoretically measured increases existed they would automatically constitute violations of the W.Q.S., even if such changes in aesthetic parameters couldn't normally be measured or seen. (PP. 481-82, Transcript). This was not consistent with his opinion that if narrative standards, such as those under discussion here, couldn't be measured because they weren't observable to the human eye they would not cause a violation of the W.Q.S. (p. 482, Transcript). For these reasons as well as those discussed earlier, I am of the opinion that Dr. Schornick's testimony should be accorded little or no weight.

Based upon the record, in its entirety, I am of the opinion that the discharge from the City of Fayetteville will not cause a violation of the various aesthetic components, herein defined, in the State of Oklahoma.

DISSOLVED OXYGEN

The 1985 W.Q.S. on dissolved oxygen, under the Beneficial Use of Fish and Wildlife Propagation appears in section 7.3(a) and states as follows:

> "Dissolved oxygen (D) criteria are designed to protect the diverse fisheries of Oklahoma. Allowable

loadings defined in Appendix I are designed to attain these criteria. Except for naturally occurring conditions, the dissolved oxygen criteria are as follows (Oklahoma Ex. 6, pp. 9-10, section 7.3(a) 1985 O.W.Q.S.):

Fishery Class	Date Applicable	D.O. Criteria (Minimum) (mg/L)	Seasonal Temp.[1] (C)
Secondary Warm Water Fishery			
Early Life Stages	April 1-June 15	4.0	25*
Other Life Stages			
Summer Conditions	June 16-Oct. 15	3.0	32
Winter Conditions	Oct. 16-March 31	3.0	18
Primary Warm Water Fishery			
Early Life Stages	April 1-June 15	6.0+	25*
Other Life Stages			
Summer Conditions	June 16-Oct. 15	5.0+	32
Winter Conditions	Oct. 16-March 31	5.0	18
Smallmouth Bass/Trout			
Early Life Stages	March 1-May 30	7.0+	22
Other Life Stages			
Summer Conditions	June 1-Oct. 15	6.0+	29
Winter Conditions	Oct. 16-Feb. 28	6.0	18

[1] For use in calculation of the allowable load as defined in Appendix I.

+ Because of natural diurnal dissolved oxygen fluctuation, a 1.0 mg/L dissolved oxygen concentration deficit shall be allowed for not more than eight (8) hours during any twenty-four (24) hour period.

* Discharge limits necessary to meet summer conditions will apply from June 1 of each year.

Under the 1985 O.W.Q.S., the upper Illinois River above the 650 foot elevation level and the upper Illinois River from Tenkiller Dam, including Tenkiller Reservoir, to the 650 foot elevation level are both designated as Smallmouth Bass Fisheries, and require a minimum dissolved oxygen level of 7.0 between March 1, and May 30, and a minimum dissolved oxygen level of 6.0 during the remainder of the year. The lower Illinois River from the headwaters of Robert S. Kerr Reservoir to Tenkiller Dam have been designated as a Trout Fishery under the 1985 O.W.Q.S., requiring the same minimum dissolved oxygen levels as the segments of the river designated as Smallmouth Bass Fisheries. (Oklahoma Ex. No. 6, p. 36, 1985 O.W.Q.S.).

The Arkansas parties, on this issue, rely primarily on the Schornick report and Dr. Walker's testimony. Dr. Schornick's report, regarding dissolved oxygen, relies on increases in phosphorus and other nutrients as the reason for his belief that the City's discharge will violate such standards (PP. 3996-3997, Administrative Record). As discussed above, Dr. Schornick's testimony on nutrients is flawed and he admits on pp. 432-33 of the Transcript that he was "speculating" when he opined that the water quality standards would be violated in Oklahoma. I am therefore of the opinion that his testimony concerning dissolved oxygen are likewise flawed since they rely on increased nutrient levels as an indicator of said violations.

Dr. Walker's direct testimony regarding dissolved oxygen is based, in large measure, on the measurements he made in Lake Tenkiller, showing existing violations of the standards due to "intense algae photosynthesis" (PP. 12-13 of Prefiled Test).

Dr. Thompson testified that the oxygen assimilative capacity of Mud Creek and Clear Creek through which the effluent will run for about 16 miles, will protect the beneficial uses of the Illinois River.

The modeling done by the Arkansas Department of Pollution Control and Ecology (ADPC & E) demonstrate that not only will the effluent experience complete oxygen recovery by the time is reaches the Illinois River in Arkansas, but will act as an oxygen resource, actually adding oxygen to the River (PP. 258-59 Transcript). Appendix D of Arkansas's Ex. No. 3, shows, by modeling, that the minimum dissolved oxygen in the receiving stream of 6.1 mg/l for a discharge of 5/5/2 BOD5/TSS/NHB-N. At a discharge of 10/15/1.5, BOD5/TSS/NH3-N the model perdicts a minimum dissolved oxygen of 6.0 lb. These values will not violate Arkansas standards of 6 mg/L of dissolved oxygen in the receiving stream and will improve further down stream due to the high reareation and turbulance in the two creeks as they pass over the spillways and dams near the golf course.) The modeling also shows that the dissolved oxygen would be completely recovered by the time the effluent reaches Clear Creek, which is upstream of that Creek's confluence with the Illinois River in Arkansas (Arkansas Ex. No. 4, p. 8).

These modeling results were reviewed by Garret Bondy of Region VI, EPA as to its technical adequacy and kinetic rates used. He testified that these factors were reasonable and would maintain dissolved oxygen standards in Mud Creek, Clear Creek and the Illinois River. Mr. Bondy also testified that approximately 35% of the discharged CBOD and less than 10% of the NBOD would reach the Illinois River in Arkansas and would have no significant impact on the River in Arkansas. He also stated that since the Oklahoma border is approximately 22 miles further down stream there would be even less impact on Lake Francis.

As to Dr. Schornick and Dr. Walker's testimony relating phosphorus levels to dissolved oxygen limits, the record indicates that no correlation between these two parameters has been attempted or demonstrated in the

Illinois River system (Fayetteville Ex. No. 3, p. 2). As to Dr. Walker's concept that dissolved oxygen levels are reduced by photosynthesis of algae and periphyton, the opposite is true since oxygen is released, not added, by that action.

In view of the evidence showing complete oxygen recovery of the effluent in Arkansas some 37 miles upstream from the Oklahoma border, it is not possible for the City's effluent to violate the Oklahoma dissolved oxygen standards. This is particularly true in light of the fact that dissolved oxygen violations in Oklahoma are occurring without the City's discharge. I found no credible evidence to suggest that the frequency of these violations would increase due solely to the City's discharge.

METALS

Section 7.1(a) of the 1985 standards regarding metals is called Raw Water Numerical standards and states the criteria to be:

RAW WATER NUMERICAL LIMITS

PARAMETERS (MG/L)	NUMERICAL LIMIT
Inorganic Elements	
Arsenic	.10
Barium	1.0
Cadmium	.02
Chromium	.05
Copper	1.0
Cyanide	.2
Fluoride	1.6
Lead	.10
Mercury	.002
Nitrates (as N)	10.0
Selenium	.01
Silver	.05
Zinc	5.0

Organic Chemicals	
Benzide	.001
Detergents (total)	.2
Methylene blue active substances	.5
Phthalate esters	.003
2, 4-D	.1
2, 4, 5-TP Silvex	.01
Endrin	.0002
Lindane	.004
Methoxychlor	.1
Toxaphene	.005

The 1985 W.Q.S. for Toxic Substances under the Beneficial Use of Fish and Wildlife propagation found in section 7.3(h) provides for the Illinois River segment as follows:

Cadmium (Cd)	2.7 ug/L
Copper (Cu)	9.1 ug/L
Lead (Pb)	35 ug/L
Mercury (Hg)	1.1 ug/L
Nickle (Ni)	96 ug/L*
Silver (Ag)	1.7 ug/L
Zinc	127 ug/L

* A methodology to establish protective criteria for Nickel is being developed. Until further criteria are adopted the 1982 criteria for Nickel remain in effect.

STATEWIDE CRITERIA (ug/L)

Arsenic**	40 ug/L
Benzene	2,200 ug/L
Chromium	50 ug/L
Pentachlorophenol	1.4 ug/L
Selenium**	35 ug/L
Toluene	875 ug/L

** A methodology to establish protection criteria for Arsenic and Selenium is being developed. Until further criteria are adopted the 1982 criteria for Arsenic and Selenium remain in effect.

The City of Fayyetteville's pretreatment standards, which are more stringent than required by E.P.A., provides that the following concentrations may not be exceeded at the head works of the City's new plant:

Arsenic (As)	.05 m/1
Barium (Ba)	5.00 m/1
Boron (Bo)	1.00 m/1
Cadmium (Cd)	0.02 m/1
Chromium (Cr)	0.05 m/1
Copper (Cu)	0.02 m/1
Cyanide (Cn)	0.05 m/1
Lead (Ph)	0.10 m/1
Manganese (Mn)	0.50 m/1
Mercury (Hg)	0.002 m/1
Nickel (Ni)	0.08 m/1
Selenium (Se)	0.02 m/1
Silver (Ag)	0.01 m/1
Zinc (Zn)	0.05 m/1

or other heavy metals or toxic materials, except by permit from the City specifying conditions of pretreatment, concentration, volumes, and other applicable provisions. (Fayetteville Ex. No. 2, p. 3).

These influent concentrations are equal to or more stringent than the 1985 Oklahoma W.Q.S. (Transcript P. 262). In 1986 the effluent from the City's old plant show the following for metals:

	Annual Average (mg/1)
Cadmium	0.010
Copper	0.0269
Chrome	0.0472
Lead	0.123

These levels are roughly equivalent to the 1985 Oklahoma W.Q.S.

According to Dr. Thompson, the new plant although not specifically designed to remove heavy metals, such

removals will nevertheless increase due to its treatment process, to a level of approximately 50% compared to a level of 35% for the old plant (PP. 249-50, 283, 251, Transcript). When the above-quoted influent levels are decreased by 50%, the discharge of the new plant will not contain measurable concentrations of metals and thus will cause no change in these parameters in the Oklahoma segment of the Illinois River (PP. 252-53, Transcript). In addition to the metal removal inherent in the new plant's treatment system, the added flow to the River when it reaches the Oklahoma border will result in further reductions in concentration of these values (PP. 250-51, Transcript).

Based upon the record, in its entirety, I am of the opinion that the discharge from the new Fayetteville facility will not cause a violation of the Oklahoma W.Q.S. as they relate to toxics or metals.

The Chief Judicial Officer also asked that I suggest any changes to the City's permit which might result from my analysis of the record. I feel that no changes are necessary since the permit already contains a mechanism for change should it be required, as follows:

"d. Permit Modification.

(1) A joint Arkansas/Oklahoma/EPA water quality study of the Illinois River Basin is currently being conducted to determine the existing water quality causative factors and possible nutrient control measures.

(2) If the findings of this study indicate that more stringent limitations for Fayetteville's effluent are necessary to insure that water qualtiy standards are met, then this permit will be modified to incorporate the more stringent limitations. This may require that additional treatment be provided or that the City's discharge to Mud Creek cease."

In my judgment, this section would apply to all river flow conditions and thus low flow situations need not be separately addressed.

CONCLUSION

Based upon the entire record, including my Determinations as to Witness Credibility and Demeanor, I am of the opinion that the NPDES Permit herein discussed, should be issued as written.

/s/ Thomas B. Yost
THOMAS B. YOST
Administrative Law Judge

Date: September 19, 1988

APPENDIX I

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

NPDES Appeal No. 88-1

In the Matter of:

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR

CITY OF FAYETTEVILLE, ARKANSAS

NPDES Permit No. AR0020010

SECOND ORDER ON PETITIONS FOR REVIEW

EPA Region VI,[1] Save the Illinois River (STIR),[2] and the Attorney General of the State of Oklahoma[3] filed separate appeals from the Administrative Law Judge's (ALJ's) Decision on Remand[4] in which he upheld the

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[1] *See* Notice of Appeal and Petition for Review of EPA Region VI (October 24, 1988).

[2] *See* Notice of Appeal and Petition for Review filed by Save the Illinois River (STIR) (October 21, 1988).

[3] *See* Notice of Appeal and Petition for Review of Decision on Remand (October 24, 1988). The Attorney General's appeal is filed on behalf of the State of Oklahoma, the Oklahoma Scenic River Commission and the Pollution Control Coordinating Board.

[4] The ALJ's Decision on Remand was in response to an Order on Petitions for Review, which I issued on June 28, 1988, as the Administrator's delegatee pursuant to 40 CFR § 124.72(b). The Decision on Remand is dated September 19, 1988.

On October 10, 1988, I wrote a letter to the Regional Hearing Clerk suspending the time for the Administrator to exercise sua

issuance of an NPDES permit to the City of Fayetteville.[5] Region VI supports issuance of the permit; however, its petition raises the issue of whether the ALJ erred when he ruled that the applicable water quality standards were not the 1982 standards (which were in effect at the time of the initial permit issuance), but

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sponte review of the ALJ's decision under 40 CFR § 124.91(b). That letter is superseded by this order and there will be no sua sponte review.

[5] On October 19, 1988, the City of Fayetteville, the State of Arkansas, the Arkansas Department of Pollution Control and Ecology, and the Beaver Water District filed a joint petition for review with the Regional Hearing Clerk. This joint petition is denied. EPA regulations require that petitions for review be filed "with the Administrator." *See* 40 CFR § 124.91(a). The joint Arkansas petition was never filed with the Administrator. In fact, the names of neither the Administrator, the Chief Judicial Officer (CJO), nor the EPA Headquarters Hearing Clerk appear on the certificate of service. I would not have been aware of this petition had my staff not discovered it by accident. Thus, the joint Arkansas petition was not filed properly, and as a consequence, it was also untimely. The Arkansas parties should have known that their petition must be filed with the Administrator—in the first appeal in this case, the Arkansas parties filed all documents properly with the Administrator. In any event, the petition does not show any clear error or that the CJO's Order on Petitions for Review or the ALJ's Decision on Remand otherwise warrant review under 40 CFR § 124.91. Once again, the Arkansas parties, in framing the arguments in their petition, ignore the important distinction between water quality laws or policies that are based purely in state law and those that a state has developed and submitted to the EPA as required by 42 U.S.C. § 1313, to become effective under the Clean Water Act (CWA). *See* Order Denying Motions for Reconsideration at 2-3 (September 12, 1988).

On October 17, 1988, the Oklahoma Wildlife Federation also filed a petition for review with the Regional Hearing Clerk. It adopts in full and incorporates by reference the Notice of Appeal and Petition for Review filed by the Oklahoma Attorney General. Because this petition was improperly filed, and as a consequence, untimely, review is denied.

rather were the post-issuance 1985 standards.[6] In their petitions, STIR and the Oklahoma Attorney General (hereafter, the Oklahoma parties) each oppose issuance of the permit and together propose a variety of issues for review: 1) whether the ALJ erred in denying STIR's August 9, 1988 motion for reconsideration, which had sought a reopening of the evidentiary hearing on the adequacy of plant capacity; 2) whether the ALJ erred in

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[6] In its petition, Region VI requests the Administrator to withdraw certain statements in earlier rulings in this case. One such statement appears in the Administrator's September 12, 1988 order, where he states that the CWA "does not require a discharger in an upstream state to meet all water quality standards of a downstream state; the upstream discharger need only comply with those that have received EPA approval." *See* Order Denying Motions for Reconsideration at 2-3 (September 12, 1988). Region VI does not allege that the statement is erroneous in any respect; it simply asserts that this statement and the others are dicta and that they raise complex issues that do not need to be decided in this case (provided the 1982 standards, rather than the 1985 standards, are deemed applicable). Region VI notes, for example, that the statements do not address an apparent conflict with Decision of the General Counsel No. 58, *In Re Bethlehem Steel Corp.* (March 29, 1977), which holds that unapproved water quality standards, which are valid under state law, must be applied by EPA in issuing an NPDES permit (unless EPA promulgates superseding federal standards pursuant to section 303 of the Clean Water Act). *Id.* at 4-5.

Region VI has not persuaded me that withdwrawal of the statements is the proper course to follow, particularly in the absence of any arguments that the statements are erroneous. Nor do I believe further briefing is necessary. It suffices to note that the scope of the statements is limited to the context of this case and therefore the Region's concerns can be raised again in another case if warranted by the circumstances. Moreover, the statements do not purport to overrule the holding in *Bethlehem Steel, supra*, which is easily distinguishable on the grounds that it does not involve an interstate discharge. Conversely, *Bethlehem Steel* does not purport to hold that a discharger in an upstream state must comply with a downstream state's non-EPA approved water quality standards. It too must be read in context. The Region is at liberty to argue, in another case, that the statements in *Fayetteville* are dicta.

concluding that the permit discharge will not violate Oklahoma's water quality standards; 3) whether the ALJ erred in interpreting and applying the beneficial use limitation, the anti-degradation policy, and the nutrient standards; and 4) whether the ALJ erred in considering evidence of other cities reducing pollutant loadings in the future. For the reasons set forth below, review of the four issues raised by the Oklahoma parties is denied. I concur with Region VI, however, that the ALJ erred in using the 1985 Oklahoma water quality standards instead of the 1982 standards. As discussed below, this error is harmless and further review is not necessary.

Discussion

As explained in the first Order on Petitions for Review, there is no automatic right to review of an ALJ's decision in an NPDES permit proceeding. *See* 40 CFR § 124.91. A petition for review is generally granted only when the initial decision is clearly erroneous (legally or factually) or involves an exercise of discretion or policy that is important and should be reviewed by the Administrator. *Kerr-McGee Nuclear Corporation (Church Rock Facility)*, NPDES Appeal No. 80-3 (May 15, 1980); *Boston Edison Company*, NPDES No. 78-7 (August 28, 1978). The party requesting review bears the burden of demonstrating that review should be granted. *Id.*

A. *The 1985 Water Quality Standards*

Region VI maintains that the ALJ improperly applied the 1985 Oklahoma water quality standards rather than the 1982 standards. The Region asserts that the water quality standards applicable to NPDES permits are those in effect at the time the permit is initially issued. As support for this assertion the Region cites 40 CFR § 122.43(b)(1):

> For a permit issued by EPA, an applicable requirement is a statutory or regulatory requirement (including any interim final regulation) which takes

> effect *prior to the issuance of the permit* * * * (emphasis added).

The Region also cites a Decision of the General Counsel, which states that "the relevant water quality standards are those in effect on the date of the initial permit issuance." [7]

It is unclear from the Decision on Remand why the ALJ believed the 1985 standards had to be met by the facility.[8] Prior to the evidentiary hearing, Judge Yost requested Region VI to submit a statement explaining which standards applied, the 1982 or the 1985. EPA's statement clearly established that the 1982 standards were in effect at the time of the initial permit issuance.[9] All of the parties' briefs on remand that specifically addressed the issue stated that the 1982 standards should apply. I cannot find any arguments in those briefs in favor of the 1985 standards. Furthermore, the ALJ did not cite any authority to support his conclusion that the 1985 standards should apply.[10] Thus, I conclude that the Region is correct and that the 1982 standards apply in the instant case. Although I am concluding that the ALJ committed clear error, I see no need for formal review and submission of briefs on this issue. No party

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[7] *See* Decision of General Counsel No. 58 (March 29, 1977).

[8] *See* Decision on Remand at 2-3 (September 19, 1988).

[9] *See* EPA's Statement Regarding Status of Water Quality Standards (August 29, 1986). Region VI issued the permit to Fayetteville on November 5, 1985. Oklahoma did not pass what the parties refer to as the 1985 water quality standards until April 4, 1986. *Id.*

[10] EPA regulations state that the Presiding Officer may grant a motion to apply regulations issued after the permit is issued when appropriate to carry out the purpose of CWA, and when no party would be unduly prejudiced. *See* 40 CFR § 124.86(c); *see also* 44 Fed. Reg. 32886-87 (June 7, 1979). Here, however, no such motion was filed, and, the provisions of 40 CFR 124.86(c) were never formally invoked.

has opposed the Region's petition.[11] I also agree with the Region that because the relevant portions of the 1985 standards do not differ materially from the 1982 standards, the error will not require any change in the decision's outcome. In addition, the parties have relied on the 1982 standards in framing their arguments throughout this proceeding. Accordingly, formal review will not be granted, despite my conclusion that the Region's petition has merit. Instead, the ALJ's decision will be allowed to stand with the understanding that the reference to the 1985 standards constitutes harmless error.

B. *The Plant Capacity Issue*

STIR argues in its petition that the ALJ erred in denying its August 9, 1988 motion for reconsideration, which had sought a reopening of the hearing to admit evidence of alleged dumping of raw sewage into Mud Creek during March, April, and May of this year. I disagree. The ALJ correctly stated that EPA regulations make no provisions for such relief.[12] Moreover, I thoroughly addressed the issue of the adequacy of the plant's technology and capacity in the first Order on Petitions for Review, and I concluded that the ALJ's decision to dismiss it as an issue for the hearing was proper. STIR had ample opportunity to make its argument for reopening the hearing in its original petition for review. Nothing in STIR's current petition for review indues me to change the first Order on Petitions for Review.

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[11] Although the Arkansas parties' response to the Region's petition was not filed within 15 days of the petition as required by 40 CFR § 124.91(a)(2), and thus, is untimely, it supports the Region's position that the 1982 standards are applicable to the Fayetteville permit. *See* Brief in Support of Response to Notice of Appeal and Petition for Review filed by EPA Region VI at 4-5 (November 14, 1988).

[12] STIR apparently believes that because I stated in an earlier ruling that EPA regulations make no provision for such relief "at this time," the proper time to raise this issue is now. However, that earlier ruling was prior to the first Order on Petitions for Review. *See* Letter from Ronald L. McCallum, Chief Judicial Officer, EPA, to Ed Edmondson, Attorney for STIR (February 8, 1988).

C. *The ALJ's Factual Findings*

The Oklahoma parties argue that there was no substantial evidence to support the ALJ's factual findings that the Oklahoma water quality standards will not be violated. They allege several factual errors regarding the following standards: nutrients, turbidity, solids, taste and odor, and beneficial use. The proper standard for factual determinations in an administrative evidentiary hearing is the preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 101-102, n. 21 (1981); *Charlton v. FTC*, 543 F. 2d 903, 907 (D.C. Cir. 1976). In the first Order on Petitions for Review, I directed the ALJ to make detailed findings of fact and I stated that "the permit should be upheld if the record shows by a preponderance of the evidence that the authorized discharges would not cause * * * [a] violation of Oklahoma's water quality standards." [13] The ALJ satisfied these requirements. His findings are detailed, and he concluded that the record shows that no violations of the standards would occur. Although some evidence of theoretical violations appears in the record, the ALJ detailed his reasons for rejecting this evidence, and therefore, I accept his conclusion that it does not rise to a level that would prevent issuance of the permit. Thus, the Oklahoma parties have not persuaded me that his reasons were wrong, and review on this issue is denied.

D. *The ALJ's Interpretation of the Water Quality Standards*

The Oklahoma parties assert that the ALJ erred in interpreting and applying the Oklahoma water quality standards. Specifically, they point to alleged errors regarding the interpretation of the beneficial use limitation

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[13] Order on Petitions for Review at 12-13 (June 28, 1988).

and the nutrients standard. I disagree. In my view, the ALJ's interpretation of these standards was reasonable. He based his interpretation on the clear definitions of the words "pollution" and "eutrophication" that appear in Oklahoma's own standards. The Oklahoma parties have not met their burden of demonstrating that the ALJ committed clear error in interpreting these definitions or using them to aid in the interpretation of other parts of the water quality standards.

The Oklahoma parties also contend that the ALJ failed to address the alleged violation of Oklahoma's anti-degradation policy. Again, I must disagree. Although the ALJ did not specifically use the words "anti-degradation policy," he implicitly addressed the policy in his detailed analysis of the discharge's potential impact on all relevant water quality parameters. Oklahoma's anti-degradation policy is not a numerical standard, such as a dissolved oxygen standard. Instead, it is a "policy," which EPA regulations require every state to include as part of its water quality standards. *See* 40 CFR § 131.12. The policy protects existing water uses from "quality degradation." *Id.* For a quality degradation to exist, there must be a degradation caused by a change in some water quality parameter such as nutrients, metals, dissolved oxygen, etc. In his Decision on Remand, the ALJ concluded that the Fayetteville discharge would not cause a detectible change in any of these parameters. Specifically he found that the discharge would *not* cause: an increase in eutrophication due to increased nutrient loading; a detectible change in any aesthetic standard (i.e., color, taste, odor, and turbidity); a detectible change in the dissolved oxygen level; or a detectible change in metal concentrations. The ALJ also found that the discharge would not impact any of the mentioned parameters so as to violate the Oklahoma beneficial use limitation. The foregoing findings have an obvious bearing on Oklahoma's anti-degradation policy, for if the Fayetteville discharge will not cause a detectible change in any of the

relevant water quality parameters, it logically follows that there will not be a "quality degradation." The Oklahoma parties have not shown that the ALJ failed to address any specific water quality parameter that would be degraded by the discharge. Thus, to the extent the ALJ erred in not making express reference to the anti-degradation policy, it was harmless error and therefore not a candidate for review.

E. *The Consideration of Future Pollutant Reductions*

The Oklahoma parties argue that the ALJ improperly considered the reductions in pollutant loadings that will occur when three new treatment plants go on line sometime in the future. I see no reason to examine whether this was a proper consideration because it is clear from the ALJ's detailed findings that he would have reached the same conclusion with or without the evidence of future reductions in pollutant loading. This evidence was only one of many factors that convinced the ALJ that the permit discharge would not violate Oklahoma's water quality standards. The ALJ determined, independent of his consideration of the future reductions of pollutants, that the relevant standards would not be violated due to the assimilative capacity of the river system.[14]

Conclusion

For the reasons stated above, review of STIR's and the Oklahoma Attorney General's petitions is denied. Although I agree with Region VI that the ALJ applied the wrong water quality standards, I find this error to be harmless.

So ordered.

/s/ Ronald L. McCallum
RONALD L. MCCALLUM
Chief Judicial Officer

Dated: December 22, 1988

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[14] *See* Decision on Remand at 7-10 (September 19, 1988).

APPENDIX J

STATUTES INVOLVED

Section 301, 33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet

water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30

of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subpargraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in not case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E), of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

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Section 303, 33 U.S.C. § 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is a waiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the

State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3) (A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such require-

ments. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls: maximum daily load; certain effluent limitations revision

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such

part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) Limitations on revision of certain effluent limitations

(A) Standard not attained

For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only; if such revision is subject to and consistent with the antidegradation policy established under this section.

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Section 401, 33 U.S.C. § 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the

construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certifica-

tion. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

* * * *

Section 402, 33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommenda-

tions to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and

any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284 (b), 1317, and 1318 of this title.

* * * *

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within

30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

* * * *

Section 510, 33 U.S.C. § 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any matter effecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

FILED
MAR 11 1991
OFFICE OF THE CLERK

Nos. 90-1262 and 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,
v.
STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,
v.
STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE STATE OF OKLAHOMA, THE OKLAHOMA SCENIC RIVERS COMMISSION, THE OKLAHOMA POLLUTION CONTROL COORDINATING BOARD, SAVE THE ILLINOIS RIVER (STIR) AND THE OKLAHOMA WILDLIFE FEDERATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the provisions of the Clean Water Act permitting a discharge of pollutants only if it would comply with "applicable water quality requirements" require compliance with the federally approved Water Quality Standards of an affected downstream State as well as those of the State in which the pollutants would initially be discharged.

(This first question is raised only by the Arkansas petition (No. 90-1262) because the affirmative answer given by the Court of Appeals was advocated by the Environmental Protection Agency (EPA) as well as the Oklahoma respondents. The second question stated below is raised by both the Arkansas petition and the EPA petition (No. 90-1266)).

2. Whether, assuming an affirmative answer to the preceding question, the Court of Appeals properly held that a discharge of sewage treatment effluent into a tributary of a specially protected scenic river would violate the prohibition of Oklahoma's federally approved Water Quality Standards (as in effect in November 1985) against any "further water quality degradation" in that river, where the EPA's findings and undisputed evidence showed that the result would be to increase the presence of pollutants that were already at excessive levels.

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IN THE

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OCTOBER TERM, 1990

No. 90-1262

STATE OF ARKANSAS, *et al.*,
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STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE STATE OF OKLAHOMA, THE OKLAHOMA SCENIC RIVERS COMMISSION, THE OKLAHOMA POLLUTION CONTROL COORDINATING BOARD, SAVE THE ILLINOIS RIVER (STIR) AND THE OKLAHOMA WILDLIFE FEDERATION IN OPPOSITION

STATUTES AND REGULATIONS INVOLVED

Because the Clean Water Act and the pertinent Environmental Protection Agency (EPA) and Oklahoma regulations contain straightforward language that, in our view, conclusively answers the questions presented by the petitions, we set forth the most significant excerpts at the outset rather than in an appendix.

I. The most pertinent portions of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, provide as follows: *

§ 301, 33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pullutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—* * *

(1) (C) not later than July 1, 1977, any more stringent limitation [than standards specified by EPA], including those necessary to meet water quality standards * * * established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or * * * required to implement any applicable water quality standard established pursuant to this chapter.

§ 303, 33 U.S.C. § 1313. Water quality standards and implementation plans

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the [EPA] Administrator.

* More extensive excerpts from each of these sections are set forth in greater detail in the separately bound Appendix to the Arkansas petition (Ark. Pet. App. 154a-171a).

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes, and also taking into consideration their use and value for navigation. * * *

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. * * *

§ 401, 33 U.S.C. § 1341. Certification

(a) (1) Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with the applicable provisions of sections 1311, * * * 1313 [and other sections] of this title. * * *

(2) * * * Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. * * * Such agency * * *

shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

§ 402, 33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) * * * [T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet * * * all applicable requirements under sections 1311 * * * [and other sections] of this title * * *.

[Subsections (b)-(d) provide for State permit programs, which supersede EPA's jurisdiction to issue permits, and specify EPA's role with respect to such programs.]

II. The Environmental Protection Agency's regulations with respect to the National Pollutant Discharge Elimination System (NPDES), 40 C.F.R. Part 122, provide as follows in pertinent part:

§ 122.4. Prohibitions * * *

No permit may be issued: * * *

(d) When the imposition of conditions cannot insure compliance with the applicable water quality requirements of all affected States * * *.

§ 122.6 Continuation of expiring permits.

(d) *State continuation.* (1) An EPA-issued permit does not continue in force beyond its expiration date under Federal law if at that time a State is the permitting authority. States authorized to administer the NPDES program may continue * * * EPA * * * permits until the effective date of the new permits, if State law allows. * * *

III. The 1982 Oklahoma Water Quality Standards ("OWQS"), as adopted by the Oklahoma Water Resources Board and approved by EPA under Clean Water Act § 303(c), *supra*, provide as follows in pertinent part: **

SECTION 1. INTRODUCTION. * * * The purpose of the Standards is to promote and protect as many beneficial uses as are attainable and to assure that degradation of existing quality of waters of the State does not occur.

SECTION 2. ADOPTION AND ENFORCEABILITY OF THE STANDARDS. The 1982 Oklahoma Water Quality Standards * * * are adopted as Rules and Regulations by the Oklahoma Water Resources Board * * * and are fully enforceable under the laws of Oklahoma. These standards shall apply to all waters of the State * * *.

SECTION 3. ANTI-DEGRADATION POLICY. * * * No further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed. * * * No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in National and State parks, Wildlife Refuges, and those designated "Scenic Rivers" in Appendix A. * * *

SECTION 5. BENEFICIAL USE LIMITATIONS. All streams and bodies of water designated as (a) [in Appendix A] are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3.

** Sections 3 and 5 are set forth in full in the Appendix to the Court of Appeals opinion (Ark. Pet. App. 85a). The 1982 OWQS were set forth in full in the Addendum to Joint Brief-In-Chief of Petitioners/Appellants filed below in May 1989.

OWQS Appendix A (at p. 21) designates the "Upper ILLINOIS RIVER above 650 foot elevation level" as having both the "a" limitation and "Scenic River" status. The Scenic river status was conferred by Okla. Stat. tit. 82 § 1452(b)(1) (1970).

STATEMENT

This case concerns the interpretation of Oklahoma's federally-approved Water Quality Standards, as in effect on November 5, 1985, in the context of a request by the City of Fayetteville, Arkansas, for a permit under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, to discharge treated sewage into a tributary of Oklahoma's Upper Illinois River, which has a specially protected status as a scenic river.

A. The Statutory And Regulatory Scheme.

1. In general, the petition of the Environmental Protection Agency (EPA) accurately describes the statutory scheme for approval or disapproval of discharges into interstate waters under the Clean Water Act and, in particular, the central role of State Water Quality Standards—such as those of Oklahoma here—under the National Pollutant Discharge Elimination System (NPDES) permit program established by § 402, 33 U.S.C. § 1342. See EPA Pet. 2-6. Rather than repeat that description here, we merely emphasize the salient points, most of which are apparent from the statutory excerpts set forth above.

2. The Act states a fundamental policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution * * *." § 101(b), 33 U.S.C. § 1251(b). To these ends, the States are required to adopt Water Quality Standards, and the Act provides for their enforcement. The purpose of the State Water Quality Standards is to supplement EPA's technology-based standards (which

determine the level and quality of pollutants that can be discharged at a particular point source), so as to assure against adverse cumulative effects from otherwise acceptable discharges. "Water Quality Standards are retained as a supplementary basis for effluent limitations * * * so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex. rel. State Water Resources Control Board*, 426 U.S. 200, 205 n.12 (1976).

3. The Clean Water Act further contemplates that the NPDES permitting process will for the most part be conducted by the States rather than by EPA. § 402(b), 33 U.S.C. § 1342(b). The procedure followed in this case—issuance of a permit in the first instance by EPA—occurred only because the State where the discharge in question originates (Arkansas) did not in 1985 have an approved permitting program in place. Since Arkansas now has such a program, and since the term of the EPA-issued permit under review here has expired, further proceedings on this matter would take place not at EPA but before the Arkansas Department of Pollution Control and Ecology, as described *infra*. And since at least thirty-nine of the States now have approved programs,[1] most such proceedings in the future will not be conducted as this one was, but rather will be before State agencies, subject only to the discretionary authority of EPA to object to the issuance of a particular permit under § 402(d) & (e), 33 U.S.C. § 1342(d) & (e).

4. Once a State's Water Quality Standards have been approved by EPA under § 303, 33 U.S.C. § 1313, they have the force of law. Neither the State adopting those standards nor a permitting agency (whether it be a State

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[1] See *Natural Resources Defense Council, Inc.* v. *EPA*, 859 F.2d 156, 173 (D.C. Cir. 1988).

agency or EPA) has authority to deviate from those standards or excuse noncompliance with them in issuing an NPDES permit. See *EPA v. California ex rel. State Water Resources Control Board, supra*, 426 U.S. at 220; *City of Sarasota* v. *EPA*, 813 F.2d 1106, 1109 n.10 (11th Cir. 1987). Each State is, however, required to conduct a triennial review of its Water Quality Standards, with public hearings and EPA participation, and any new or altered Standards must have EPA's prior approval as "meet[ing] the requirements of [the Clean Water Act]." § 303(c)(3), 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 131.20-22. The Oklahoma Standards applicable to this case were adopted and approved by EPA in 1982. They have subsequently undergone two triennial reviews which have resulted in reapprovals by EPA, the latest on December 28, 1989. Both subsequent versions have included some changes in the language in issue here.[2] Another triennial review is scheduled to begin in May 1991.

5. The Oklahoma Water Quality Standards (OWQS) provide special protection for the Upper Illinois River, which is the Oklahoma body of water threatened by the Fayetteville sewage treatment plant, by designating it as an Oklahoma Scenic River and as subject to special "beneficial use limitations." Thus, the Upper Illinois River is protected by a federally approved and enforceable Standard categorically prohibiting any "new point source discharge of wastes" which would result in "water quality degradation". OWQS §§ 5, 3.[3]

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[2] The standards applied below were those adopted and approved in 1982 because they were in effect when the permit was originally issued on November 5, 1985. See Second Order of EPA Chief Judicial Officer (CJO), Ark. Pet. App. 148a-150a. The CJO (speaking on behalf of the EPA Administrator) found that there was no material difference between the 1982 and 1985 OWQS (Ark. Pet. App. 150a). The Court of Appeals, however, disagreed (*id.* 52a).

[3] As previously noted, these Standards are equally binding upon any discharges from points sources in Oklahoma. There has not been any suggestion that the Standards are anything other than

B. The Proceedings Below.

In 1985, the City of Fayetteville, Arkansas, applied to EPA for an NPDES permit allowing a new sewage disposal plant to discharge half of its effluent into a tributary of the Illinois river upstream from the Oklahoma border.[4] As previously noted, the permit proceeding was before EPA because an approved State permitting program was not yet in place in Arkansas, as it now is. The State of Oklahoma, its agencies principally concerned with water quality and a nonprofit group called Save the Illinois River (STIR) opposed granting such a permit and evidentiary hearings ensued before an EPA Administrative Law Judge (ALJ). On review of the ALJ's initial decision recommending approval of the permit (Ark. Pet. App. 93a-107a), the EPA Administrator, acting through his Chief Judicial Officer (CJO), ruled that the Fayetteville discharges must satisfy Oklahoma's Water Quality Standards as well as those of Arkansas—a position to which the government has consistently adhered here and elsewhere as fundamental to the Clean Water Act scheme—and remanded for further examination of the question whether the proposed Fayetteville discharge would violate the OWQS (First Order, Ark. Pet. App. 108a-121a). The CJO held that the ALJ had erred in his premise that the standard to be applied was to be found in federal law and was whether the discharge

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bona fide exercises of Oklahoma's duties under the Clean Water Act and Oklahoma statutes to protect all waters within that State, or that they are discriminatory against out-of-state point sources. The EPA Administrative Law Judge expressly found that the OWQS "do not amount to an attempt to establish a separate system for out-of-state sources since they apply equally to Oklahoma sources" (Ark. Pet. App. 125a).

[4] Fayetteville had historically discharged all of its wastewater into the White River (which does not flow into Oklahoma), but even with the new treatment facility the White River was unable to assimilate the discharges from the Fayetteville plant without violating Arkansas' own Water Quality Standards.

would have an "undue impact" upon the Illinois River. Rather, the proper standard was simply whether the discharge would be in strict compliance with the terms of Oklahoma's federally approved Standards. Ark. Pet. App. 116a.

On remand, the ALJ concluded that the OWQS were not violated because, in the ALJ's words, the Oklahoma parties had failed to "show by substantial evidence that the City's discharge will create a nuisance or render the Illinois River in Oklahoma harmful, detremental [sic] or injurious to any beneficial use of the river" (Ark. Pet. App. 126a-27a). Moreover, he relied upon the proposition that "the mere likelihood of being able to measure a difference [in pollutant levels in Oklahoma] is insufficient to show a violation absent a showing that such increases will cause increased eutrophication" (*id.* 130a).[5] Upon appeal again to the CJO, the ALJ's approval of the permit on remand was affirmed on the Administrator's behalf (Second Order, Ark. Pet. App. 145a-153a). This Second (and final) Order held that the ALJ had correctly applied the "clear" language of the Oklahoma Standards (*id.* 152a) and that although he had failed to "mak[e] express reference to the antidegradation policy, it was harmless error" because "it logically follows [from the ALJ's negative findings on measurable harm] that there will not be a 'quality degradation'" (*id.* at 153a).

Notwithstanding his conclusion in favor of the permit, the ALJ's decision on remand included findings recog-

[5] The definition of eutrophication is discussed by the Court of Appeals at Ark. Pet. 46a but is not important for present purposes. The pertinent point here is that the EPA decision was based upon the proposition that the OWQS presented no bar to the Fayetteville discharge even if it delivered measurable pollutants to the Upper Illinois River in Oklahoma, so long as measurable deterioration of the River's condition was not shown to have specifically resulted. This is analogous to saying it is permissible to feed a person poison so long as he does not become clinically ill.

nizing that 20 to 25 percent of the nutrients discharged by Fayetteville would be present after the Illinois River crosses the Oklahoma border (Ark. Pet. App. 129a), that "6 lbs/day [of phosphorus from Fayetteville] would be bio-available to organisms over the Oklahoma border" (*id.*), and that there would be some increase in nitrogen (*id.* 130a). It is undisputed that these additional pollutants would not be allowed to be in the River but for the Fayetteville NPDES permit. The ALJ's findings were adopted by the Administrator in the CJO's Second Order (Ark. Pet. App. 151a).

Three petitions for judicial review of EPA's final decision (the Second Order) were filed in early 1989. The petition of the Arkansas parties (petitioners here) challenged EPA's authority to require, as a condition of an NPDES permit, that a discharger in an upstream State comply with the Water Quality Standards of a downstream State. The petitions by the Oklahoma parties (the present respondents) asserted that the issuance of the NPDES permit violated Oklahoma's Standards.[6]

The Court of Appeals' unanimous opinion affirmed EPA's interpretation of the Clean Water Act as requiring application of the federally approved Water Quality Standards of any affected downstream State as well as those of the State where a discharge occurs, and agreed with the CJO that the issue here was one of assuring strict compliance with the terms of the OWQS. The Court went on, however, to reverse EPA's final decision as "flawed by misinterpretation and misapplication of two important Oklahoma water quality regulations and by arbitrary disregard for certain expert testimony" (Ark. Pet. App. 44a). Although there were no State court decisions interpreting the OWQS, the Court found the plain language of these governing State regulations

[6] The Arkansas petition was filed in the 8th Circuit, but was transferred to the 10th Circuit and consolidated with the Oklahoma petition. The Oklahoma Wildlife Federation intervened in the Court of Appeals.

to be clear and contrary to EPA's decision (*e.g.*, Ark. Pet. App. 47a-48a, 51a).

The Court of Appeals began its exegesis of State law by noting that the protected "beneficial uses" of the Upper Illinois River under the OWQS include "fish and wildlife propagation", "aesthetics" and "smallmouth bass", making the water quality criteria governing turbidity, nutrients and dissolved oxygen particularly significant and therefore necessitating consideration of the phosphorus and nitrogen undisputedly present in Oklahoma as a result of the Fayetteville discharge (Ark. Pet. App. 44a-45a). It held that EPA had misread the OWQS in failing to recognize that the nutrient criteria apply to the entire reach of the River in Oklahoma (*id.* 45a-46a). More generally, the Court rejected EPA's interpretation of the OWQS as protecting only against actual measurable injury to the River specifically traceable to the Fayetteville discharge:

> "[W]e believe the plain language of the regulations manifests a clear intent to allow no degradation of the water quality of scenic rivers. More specifically, the regulations disallow any additional discharge of pollution (either a new point source or an increase from an existing source) to a scenic river if its water quality *has been degraded* or if the new source *would degrade it.*" (Ark. Pet. App. 47a-48a)

> "* * * We conclude the requirements of the Beneficial Use Limitations/Anti-Degradation Policy are violated when the water quality of a scenic river [such as the Upper Illinois] undergoes any human-caused, detectable change. By 'detectable change' we mean any detectable change in a water quality parameter such as turbidity or phosphorus * * *. We do *not* mean a detectable change that violates a numeric criterion for that parameter * * *, which criterion would otherwise apply if the Beneficial Use Limitations were not applicable (i.e., if the receiving waters were not designated as a scenic river or otherwise as '(a)' in [OWQS] Appendix A)." (Ark. Pet. App. 49a)

Moreover, the Court noted that the ALJ had improperly put the burden of proof with respect to degradation upon the Oklahoma opponents of the permit, rather than on the Arkansas proponents, in violation of the EPA regulation governing hearings on EPA-issued permits (Ark. Pet. App. 52a-53a).[7]

The Court of Appeals went on to determine that, as a matter of fact, it was undisputed that the water quality of the Upper Illinois River was already degraded under the criteria of the OWQS by excessive nutrients and turbidity (Ark. Pet. App. 55a-65a). Similarly, the record showed without contradiction, and indeed contained findings recognizing, that substantial amounts of phosphorus, nitrogen and other organic pollutants put into the water by the Fayetteville plant would remain after the River entered Oklahoma (Ark. Pet. App. 65a-67a). See pp. 10-11, *supra*. Finally, the Court found undisputed evidence that such pollutants are of a type that would tend to degrade further the quality of Upper Illinois River waters (Ark. Pet. App. 67a-72a).

The Court of Appeals rejected the contention that an inability to detect the Fayetteville effluent's "individual impact on Illinois River water quality" would suffice to satisfy the OWQS, explaining that

> "If we were to accept this logic, once water quality standards in a stream were violated, additional new discharges might be permitted indefinitely so long as each one would have an unmeasurable individual impact. The absurdity of such a policy is manifest." (Ark. Pet. App. 78a)

Therefore, the Court

> "reject[ed] any notion that, once water quality standards [such as those stated in the OWQS]

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[7] 40 C.F.R. § 124.85(a)(1) provides that "The permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants to be discharged should be issued and not denied. This burden does not shift."

> have been violated (i.e., the quality of the receiving waters has been degraded), the incremental impact of a proposed additional discharge must itself be detectable. * * * Rather, if a body of water is experiencing WQS violations and a proposed new source would discharge the same pollutants to which those standards apply, that source may not be permitted if its effluent will reach the degraded waters." (Ark. Pet. App. 79a-80a)

Under this interpretation of the governing Oklahoma Standards, and given the undisputed evidence and findings of a discharge of pollutants of the kind that caused an existing degradation, the Court found no occasion for any remand to the permitting authority for any further proceedings. On these facts, no permit could be issued that would comply with the Oklahoma Standards as in force (with federal approval) at the time when the Fayetteville permit was initially issued.[8]

C. The Present Situation.

There has been no stay of the Fayetteville NPDES permit either before or since the Court of Appeals' decision. Thus, the sewage plant has been in operation and discharging its effluents since the permit was finally approved by EPA in December 1988. The EPA permit expired by its own terms after five years from the date of its original issuance, on December 9, 1990. An Arkansas permitting program having been put in place in the interim, the Arkansas Department of Pollution Control and Ecology has exercised its authority to continue the permit in effect pending a new permit proceeding,[9] and such a proceeding has been commenced before that Department. In the meantime, the 1982 OWQS inter-

[8] In this regard, the Court reiterated that the burden of proof was on the advocates of the permit, as 40 C.F.R. § 124.85(a)(1) provides. See Ark. Pet. App. 72a n.49.

[9] See 40 C.F.R. § 122.6(d).

preted and applied below have twice been amended (in 1985 and 1988) and each time approved by EPA as amended. Another triennial review of the OWQS is scheduled to begin in May 1991. Thus, both the Fayetteville permit and the Oklahoma Water Quality Standards will soon be under active administrative review, by the States of Arkansas and Oklahoma respectively.

REASONS FOR DENYING THE PETITION

The petitions come to the Court in a somewhat complex and unusual posture. The first issue—whether Oklahoma's Water Quality Standards apply at all—is presented only by the Arkansas petition; EPA and the Oklahoma respondents are in agreement that the Court of Appeals correctly held that the OWQS must be satisfied. The second issue—whether the Court of Appeals properly interpreted the OWQS and applied them to the facts of this case—is presented by both the EPA and Arkansas petitions, but they frame rather differently their objections to the decision below and the propositions that they ask this Court to decide. The Arkansas petitioners apparently ask this Court to rule that even though downstream States' Water Quality Standards do apply, and even though the Oklahoma Standards applied below were approved by EPA, the Clean Water Act somehow invalidates those Standards insofar as they would preclude further discharges of pollutants in upstream States. The Solicitor General, on the other hand, does not challenge the Oklahoma Standards, but more modestly asks the Court to hold that the Court of Appeals did not pay proper deference to EPA's lenient interpretation of them.

Certiorari should be denied as to the Arkansas petition's first question because there is no substantial issue as to the correctness of the Court of Appeals' holding that the Water Quality Standards of a downstream State apply to NPDES permits under the Clean Water Act and that holding does not conflict with any decision

of any other court of appeals, State court of last resort or this Court.

Certiorari should be denied as to both petitions' complaints about the Court of Appeals' interpretation and application of the Oklahoma Water Quality Standards in this case because they present no focused issue of general significance for this Court to decide, much less any issue as to which there is any conflict among the lower courts. The Court of Appeals correctly interpreted and applied those Standards in accordance with their plain language. Moreover, this case is inappropriate for further review because the NPDES permit considered below has now expired and can be renewed only by a different agency which must examine current circumstances.

I. NO SUBSTANTIAL ISSUE FOR REVIEW IS RAISED BY THE COURT OF APPEALS' AGREEMENT WITH EPA THAT DOWNSTREAM STATE STANDARDS APPLY TO NPDES PERMITS.

The decision below on the Arkansas petition's first question does not—as the petition would have it—involve any fundamental principle of federalism. The Court of Appeals simply gave the unambiguous language of the Clean Water Act its plain meaning. The petition's claims of conflict with decisions of this Court and lower courts will not withstand analysis. And the petition's prediction that this interpretation will "disrupt administration of the Clean Water Act" (Ark. Pet. 13) has not been borne out in the years in which the NPDES program has operated under regulations embodying the same interpretation.

The Administrative Law Judge (Ark. Pet. App. 125a) and the EPA Administrator (speaking through the Chief Judicial Officer, *id.* 116a-117a) found the statutory language "clear" and "plain and straightforward" on this point. After detailed consideration, the Court of Appeals similarly concluded that the Clean Water Act could not be read otherwise. *Inter alia*, the Court explained that

> "[T]houghtful consideration of the language of [§ 301(b)(1)(C), 33 U.S.C.] § 1311(b)(1)(C)—
>
> there *shall be achieved* . . . any more stringent limitation, including those *necessary to meet* water quality standards . . . established pursuant to any State law or regulations . . . or *required to implement* any applicable water quality standard established pursuant to this chapter

(emphasis added)—exposes the irrationality of Arkansas's argument. In order to ensure that the EPA-approved water quality standards in all states are 'met' or 'implemented,' it *is* 'necessary' to require dischargers to meet the applicable requirements of other affected states as well as those of the source state. There could be no assurance of achieving a state's more stringent WQS if an upstream, out-of-state discharger were not required to comply with those standards." (Ark. Pet. App. 22a-23a)[10]

The Court of Appeals confirmed this interpretation by an exhaustive analysis of the entire statutory and regulatory scheme as well as the legislative history (Ark. Pet. App. 19a-24a, 29a-43a).[11] It also found strong support in EPA's implementing regulations, which provide *inter alia* that no permit shall be issued absent "compliance with the applicable water quality requirements of *all affected states*" (Ark. Pet. App. 18a-19a, quoting 40

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[10] The Court noted that § 402 dictates that NPDES permits must ensure compliance with all the requirements of Section 301. 33 U.S.C. § 1342(a)(2) and (b)(1)(A). Ark. Pet. App. 20a.

[11] The Court further held that "[b]ased on its plain language * * * we agree with EPA that the purpose of [§ 401(a)(2), 33 U.S.C. §§ 1341(a)(2), requiring 'compliance with applicable water quality standards'] must be to enable affected states to ensure that their water quality will not be jeopardized by a discharge in another state. Only a strained interpretation of the statute could produce the result Arkansas seeks—that 'applicable water quality requirements' refers to the WQS of only the source state." (Ark. Pet. App. 31a).

C.F.R. § 122.4(d)).[12] Any other interpretation, the Court noted, would encourage "pollution shopping" in derogation of the Act's underlying purpose of enforcing strict standards nationwide (Ark. Pet. App. 23a).

The Court of Appeals correctly held that "[t]his is an issue of first impression in the circuit courts," *i.e.*, there is no conflict (Ark. Pet. App. 14a), and that the Arkansas argument is not supported by *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987) (*id.* 25a-28a, 22a n.9). As the Court of Appeals explained, *International Paper*'s holding that a non-source State's common law of nuisance was preempted by the Clean Water Act does not detract from the statutory provisions requiring the States to adopt Water Quality Standards and specifically incorporating them into the permitting process.[13] The summary description of the NPDES system in *International Paper* upon which the Arkansas petition relies most heavily was plainly dictum which did not purport to prescribe answers to particularized statutory questions that were in no way before this Court in that case, and in any event the holding below is consistent with it.[14]

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[12] To the same effect, the Court of Appeals also quoted from § 122.44(d)(4) and § 131.10(b). Such implementing regulations are, of course, authoritative indicators of statutory meaning. *E.g.*, *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *E.I. DuPont De Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.25 (1977).

[13] *A fortiori*, the questions as to preemption of federal common law discussed in *City of Milwaukee* v. *Illinois (Milwaukee II)*, 451 U.S. 304 (1981), have nothing to do with this case.

[14] The generalization that a non-source State "does not have authority to block the issuance of the permit," 479 U.S. at 490, is not inconsistent with the holding below that the entities which do have such authority (the certifying source State and the permitting agency) must consider the statutorily mandated and EPA-approved Water Quality Standards of the affected non-source State. The rationale of the *International Paper* decision was that "application of Vermont law [rather than New York law] against IPC would allow respondents to circumvent the NPDES permit system * * *." *Id.* at 494. In this case, of course, Oklahoma has sought to enforce, not circumvent, the NPDES statutory provisions.

Nor is there any conflict between the decision below and the lower court cases from which the Arkansas petition also attempts to distill categorical disapproval of any downstream State limitation on pollutant discharges. *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985), dealt only with the same issue later definitively decided in *International Paper*. Moreover, as the Court of Appeals noted below, the Seventh Circuit itself recognized the distinction between the situation before it—where an affected State was seeking to enjoin a discharge from another State under its own common law of nuisance—and assertion of an affected State's rights under the Clean Water Act permit provisions themselves (Ark. Pet. App. 25a).[15]

The only Clean Water Act issue in *National Wildlife Federation* v. *Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990), was whether the discharger was obliged to obtain a § 401 *certificate* from Oklahoma on the theory that effects there made Oklahoma in effect a *source* State. The District of Columbia Circuit simply held that it was not.[16]

The only other conflict asserted in the Arkansas petition—with a State court decision in *State* v. *Champion International Corp.*, 709 S.W.2d 569 (Tenn. 1986), which

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[15] Indeed, the passage from the Seventh Circuit's opinion quoted at Ark. Pet. 17-18 itself negates the generalization the petition attempts to derive from it. It specifically makes an exception for situations where the Clean Water Act has "provisions expressly protecting the interests of other states." As we have shown, there are several such provisions relating to the issuance of permits.

[16] The State of Oklahoma was no longer a party, having previously agreed to a settlement with Arkansas in that matter. See 912 F.2d at 1474.

this Court vacated for further consideration in the light of *International Paper*, 479 U.S. 1061 (1987)—has no more substance. That decision involved only claims brought in Tennessee court under Tennessee statutes and common law, and said nothing about the role of State Water Quality Standards under the Clean Water Act.[17]

II. NO ISSUE APPROPRIATE FOR REVIEW BY THIS COURT IS PRESENTED BY EITHER PETITIONER WITH RESPECT TO THE INTERPRETATION AND APPLICATION OF THE OKLAHOMA WATER QUALITY STANDARDS TO THE UNIQUE CIRCUMSTANCES OF THIS CASE.

Strictly speaking, the second question framed by the Arkansas petition is a non-issue; in the words of Arkansas' statement of the question, the Court of Appeals did not hold (and no party has urged) that "a pre-existing violation of water quality standards * * * automatically precludes the issuance of new permits" (Ark. Pet. *i.*). All that the Court of Appeals held is that, in the light of undisputed facts and findings concerning the condition of the Upper Illinois River at the time of the EPA permit proceeding below, the 1982 Oklahoma Water Quality Standards approved by EPA precluded any discharge into that River of the additional pollutants produced by the Fayetteville sewage plant because pollutants of those kinds had already reduced the River's water quality below acceptable standards. What the situation might be as to other rivers in other States with different Water Quality Standards, or even as to the same river in the light of potentially changing conditions and

[17] The question of the applicability of downstream States' Water Quality Standards has recently been raised in the Court of Appeals for the Fourth Circuit by a petition for review of a subsequent EPA decision following the decision below on this issue. *Champion International Corp.* v. *EPA*, 4th Cir. No. 91-2302, filed January 3, 1991. If, as is extremely unlikely, the Fourth Circuit were to disagree with the decision below, that would be time enough for this Court to consider whether the issue is appropriate for its review.

Standards, was obviously not decided by the Court of Appeals.

Insofar as the Arkansas petitioners now ask this Court to hold that the Clean Water Act or some other federal law categorically precludes the adoption or application of any such State Water Quality Standard, they are foreclosed by their failure to make any such argument in the proceedings below. In any event, it is plain from the face of the Arkansas petition that there is no authority for any such argument. The petitioners cite no statute or other specific source of prohibition and do not even attempt to deal with the Clean Water Act provisions which broadly require States to adopt Water Quality Standards and require NPDES permits to comply with them without specifying any limitation except that they must be approved by EPA (as the 1982 OWQS were).[18]

EPA's present argument that its approval of the Fayetteville permit should have been affirmed as an exercise of reasonable administrative latitude in its application of the 1982 Oklahoma Standards is at odds with its position in the administrative proceedings below (articulated particularly clearly in the Chief Judicial Officer's First Order) that the OWQS were to be strictly applied. EPA's present position more closely resembles

[18] The Act (*e.g.*, 33 U.S.C. § 1311(b)(1)(C)) and EPA's implementing regulations (*e.g.*, 40 C.F.R. § 131.4) specifically encourage the States to impose stringent Water Quality Standards. Both the CJO (Ark. Pet. App. 117a & n.15) and the Court of Appeals (Ark. Pet. App. 76a) so recognized. See also pp. 6-7, *supra*.

There is no basis for the Arkansas petition's apparent suggestion —not argued below—that § 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), implicitly limits what a State's Water Quality Standards can do to prevent further degradation of already polluted waters. Section 303(d) requires States to establish numerical limits on pollutant discharges into such waters, but does not in any way purport to preclude a State from adopting more stringent "narrative" standards simply forbidding any further discharge of pollutants into specified waters.

the initial position of the Administrative Law Judge roundly rejected in the First Order—which was that "federal law" left room for administrative balancing of the Oklahoma restriction against other considerations. See pp. 9-10, *supra*. The First Order correctly held that the Act required "strict compliance" with the OWQS (Ark. Pet. App. 116a), and the Administrator never purported to exercise the latitude that he now argues he was improperly denied.

For the same reason, the familiar principle of deference to a federal agency's interpretation of its *own* regulations could not support EPA's present argument, even if that principle included *State* regulations, like those here, which are adopted by a federal statute. The EPA petition's invocation of the principle depends upon the premise that "the terms of [the Oklahoma] standard are ambiguous or silent" on the point in question (EPA Pet. 18). But the Administrator's decisions below expressly rejected any such characterization of the OWQS (Ark. Pet. App. 152a) and the Court of Appeals found that the permit violated their clear and unambiguous requirements. Even if the Administrator had purported to work within a zone of "reasonable interpretation of the OWQS, the Court of Appeals has determined—correctly—that his interpretation was unreasonable. Such a determination is well within the normal scope of judicial review even where an agency's interpretation of its own regulations is in issue. *E.g., University of Cincinnati* v. *Bowen*, 875 F.2d 1207, 1209 (6th Cir. 1989); *Caiola* v. *Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988); see, *e.g., United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (no deference to administrative interpretation if it is "plainly erroneous or inconsistent with the regulation").[19]

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[19] Indeed, the failure of the permit decision to follow the rule on burden of proof set out in EPA's own regulations (p. 13, *supra*) was by itself sufficient ground for reversal.

The fact that EPA has the power to disapprove or modify State Water Quality Standards when they are adopted or amended (EPA Pet. 18) diminishes rather than enhances its claim of a need for latitude to mitigate their application in particular cases. The appropriate method for dealing with any possible interference with national policies that might develop from application of the standards adopted by Oklahoma or some other State is through the triennial review process which reexamines each State's standards in the light of experience and provides for their modification as necessary.[20] The Act is clear, however, that duly approved standards are to be strictly enforced unless and until they are so modified. See *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 220 (1976); *City of Sarasota* v. *EPA*, 813 F.2d 1106, 1109 n.10 (11th Cir. 1987). The logic of EPA's position in this Court is particularly questionable in the light of the fact that NPDES permits are now predominantly issued by State agencies in source States; surely EPA does not suggest that a source State's agency should have flexibility to mitigate the application of a downstream State's restrictions by liberal "interpretation".[21]

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[20] Thus, if EPA truly believes that the 1982 OWQS imposed "administratively unworkable" and "draconian" restrictions (EPA Pet. 23-25), it has had—and will soon have again—the means to make them consistent with the purposes of the Act, which are designed to take into account all uses of affected waters. § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). We doubt, however, that counsel's alarmist rhetoric would withstand analysis in the more dispassionate forum of the triennial review of the OWQS that is about to begin.

[21] EPA's role and powers in exercising its discretion to object to State permit decisions are obviously not before the Court in this case. Thus, any questions as to how they should be exercised must await another day.

The EPA petition's reliance upon this Court's *Milwaukee* and *International Paper* decisions (EPA Pet. 13-15) is no more apposite than the Arkansas petition's reliance upon such cases in the first

At most, the petitioners present the question whether the Tenth Circuit correctly interpreted Oklahoma's prohibition against further "degradation" of the Upper Illinois River and whether it properly relied upon the undisputed evidence (and ALJ findings) that significant amounts of harmful pollutants from the Fayetteville sewage plant would be present in Oklahoma. EPA's intricate argument that such "degradation" occurs only when measurable *injury* is documented—rather than simply when it is determined that harmful pollutants are added to the river by a new discharge—presents no question of federal law warranting this Court's attention. Even if the Tenth Circuit had been wrong in the latter interpretation and in its assessment of the undisputed evidence, its interpretation focused only on one State's Water Quality Standards as in effect at a particular time, and its assessment of the evidence peculiar to this case presents no issue of general significance.[22] For these

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question's challenge to EPA's application of downstream standards. Those cases involved the role of federal and State common law apart from the Clean Water Act's statutory scheme, not the role of State regulations expressly mandated by and incorporated in that statutory scheme after federal approval.

[22] The correctness of the Court of Appeals' interpretation is plain from the language of the OWQS read in the light of the important protective role State Water Quality Standards have in the Clean Water Act scheme. That the Fayetteville discharges have a tendency to "degrade" the waters into which they flow is all but self-evident from the fact of the proposal to divert half of those discharges into the Illinois River rather than continue to deposit all of them into the intrastate river that previously received them. If the discharges were innocuous, there would have been no need to put any of them into the Illinois River.

The Court of Appeals simply held that under the Oklahoma Standards there could be no additional discharges of pollutants into a river that had already been determined to contain higher levels of those pollutants than it could stand. There is no scientific complexity in the Court's determination that the EPA record so demonstrated without dispute, and indeed the ALJ had so recognized in findings that the Administrator did not question. The holding below is thus analogous to the common sense proposition that a patient

reasons, the decision below concerning the interpretation and application of Oklahoma's Standards cannot have the sweeping and dire consequences portrayed by the petitions, but is narrowly limited by place and time.

As previously noted, the EPA-issued permit reviewed below has not been stayed but expired in December 1990. The Fayetteville plant continues to operate under temporary authority granted by the Arkansas Department of Pollution Control and Ecology (ADPCE), which has superseded EPA as the administrator of the relevant permit program. That Department is currently considering Fayetteville's application for a renewal of the permit for a new five-year term. While the Court of Appeals' decision establishes the law to be applied in such subsequent proceedings, the City of Fayetteville would naturally not be precluded from contending that there have been pertinent changes in the Oklahoma Water Quality Standards (which have been amended twice with EPA approval[23]) or that evidence about the actual effects of the Fayetteville discharge and the current condition of the Upper Illinois River could require a different outcome at this time. Conversely, the opponents of the permit might well now be able to adduce evidence requiring denial of a renewal even under the incorrect criteria applied by EPA, thereby mooting the interpretation issue. These evolving circumstances under-

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should not be given any more of a substance that has made him sick, without any need for a clinical determination as to how much sicker it would make him. It has been held in a related context that discharging a forbidden substance violates the Clean Water Act without any need to prove actual injury. *Chevron U.S.A., Inc.* v. *Yost*, 919 F.2d 27 (5th Cir. 1990).

[23] As previously noted, EPA's CJO and the Court of Appeals were in disagreement as to whether the 1985 amendments made any substantive change. The impact of the 1988 amendments and any further amendments in the 1991 triennial review will remain to be considered.

score the inappropriateness of further review of this case.[24]

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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[24] Obviously, any question as to whether the Court should have remanded to EPA rather than reversing its permit approval (EPA Pet. 25-26) is moot because the EPA permit reviewed below has expired and EPA now has no jurisdiction to grant a permit for an Arkansas discharge. § 402(c)(1), 33 U.S.C. § 1342(c)(1).

(7)

No. 90-1262

Supreme Court, U.S.
FILED
MAR 15 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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* There have been no changes in the parties to the proceedings listed on page ii of Arkansas' petition.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents' brief in opposition is most revealing for the points that it implicitly concedes and declines to address. *See* Section I *infra*. But even the points that Oklahoma does choose to address in no way diminish the need for Supreme Court review or demonstrate that this case is inappropriate for resolution of the issues presented. *See* Section II *infra*.

I. RESPONDENTS' DEFENSE OF THE DECISION BELOW ACTUALLY EMPHASIZES THE NEED FOR SUPREME COURT REVIEW.

In defending the decision below, Oklahoma readily confirms the sweeping nature of the Tenth Circuit's first holding regarding the applicability of downstream state standards to facilities in upstream states. Not only *must* EPA and state permitting agencies apply the downstream state standards, but they have absolutely no discretion to depart from or interpret those standards. *See, e.g.*, Br. Opp. at 11, 16 (mandating "strict compliance"). In respondents' view, the Tenth Circuit was fully justified in giving downstream states a veto power over the permitting of sources in upstream states.

Similarly, Oklahoma is quick to support the absolute nature of the Tenth Circuit's second holding requiring a ban on new permits. Although respondents suggest the ban might not apply in other states (a point addressed in Section II.C *infra*), Oklahoma explicitly endorses the mandatory and immediate nature of the ban where it does apply. The ban even precludes issuance of permits for new sources that would have no detectable adverse effect on water quality. Br. Opp. at 13-14. As shown by EPA, Arkansas, and the states and cities submitting *amicus* briefs, however, this ban would dramatically change the existing regulatory system, and whether intended or not by Oklahoma, it is already being invoked by federal agencies in other states and circuits. *See infra* note 4.

Finally, apart from a passing disclaimer, respondents prefer to ignore the revolutionary impact of the Tenth Circuit's decision. *See* EPA Pet. at 13, 23; Ark. Pet. at 8, 26-29. As the petitions by both EPA and Arkansas demonstrate, and the *amicus* briefs submitted by other states, cities and industries confirm, the change in law mandated by the Tenth Circuit will severely disrupt the Clean Water Act (CWA) permitting process and jeopardize the permits for countless facilities now under construction or in planning. *See* Brief of Colorado *et al.* as *Amici Curiae* at 8-9; Brief of Montana as *Amicus Curiae* at 6; Brief of The Association of Metropolitan Sewerage Agencies *et al.* as *Amici Curiae* at 17-18; Brief of Champion International Corp. *et al.* as *Amici Curiae* at 12-13. Again, Oklahoma treats that impact as only appropriate, and it offers these other affected parties no quarter.

After a decade of disputes with Arkansas over interstate waterways, Oklahoma has finally achieved its own parochial objectives in the Tenth Circuit. But the rest of the nation now has to live with the disruptive effects of the Tenth Circuit's decision, absent review by this Court. Respondents' effort to ignore these nationwide consequences does not make them disappear.

II. RESPONDENTS' SPECIFIC ARGUMENTS DO NOT DIMINISH THE IMPORTANCE OF THE ISSUES PRESENTED.

A. Respondents' Assertion Of "Correctness" Is Not A Reason For Denying Review.

Respondents' primary ground for opposing certiorari is that they believe the Tenth Circuit's decision is clearly "correct." Br. Opp. at 15. Most prevailing parties feel that way. Before succeeding in the Tenth Circuit, however, Oklahoma fully agreed that these interstate issues were substantial and itself urged that resolution by the Supreme Court was necessary. Motion of Oklahoma for Leave to File Complaint, *Oklahoma* v. *Arkansas* (No. 93, Orig.), *motion denied*, 460 U.S. 1020 (1983). Moreover,

respondents base their new patina of clarity on nothing more than isolated snippets of statutory language and an unsubstantiated assertion that the Tenth Circuit's decision is consistent with current practice under the CWA. Br. Opp. at 16-17.

The question presented is whether the CWA *compels* permitting agencies to apply, without any deviation or flexibility, the standards of downstream states. Arkansas contends that the statute gives agencies the *discretion* to apply these standards and to decide how they should be considered in any given case. Oklahoma's rigid view to the contrary certainly is not compelled by the statute (even the Tenth Circuit needed over thirty pages to justify its conclusion), and that view has not previously been accepted in any other litigation. Moreover, Oklahoma's view completely ignores the language in § 402, among other provisions. Section 402 was specifically intended by Congress to address the precise question at issue and expressly treats downstream standards as a discretionary consideration, rather than as automatically applicable. CWA § 402(b)(5), (d)(2), 33 U.S.C. § 1342 (b)(5), (d)(2); Ark. Pet. at 14-15.[1]

Respondents are on even weaker ground in asserting that the Tenth Circuit's holding is consistent with the current administration of the CWA. Respondents offer no evidence to support this claim and, in fact, the *amicus* briefs filed by various states directly contradict the respondents. As those briefs explain, the current practice of states with approved permitting programs is to consider only the water quality standards of the source state, and not downstream states, when evaluating a permit application. Brief of Colorado *et al.* as *Amici Curiae* at 6; Brief of Montana as *Amicus Curiae* at 6. Thus, far from supporting the Tenth Circuit's decision, the ac-

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[1] It would make no sense to suggest that EPA has even less discretion in the application of downstream standards when it is the permitting agency under § 401, 33 U.S.C. § 1341.

tual practice in administering the Act runs directly contrary to the court's new construction.

Respondents' assertion of "correctness" is further refuted by the untenable situation created as a result of the Tenth Circuit's elimination of any mechanism for balancing the competing interests of upstream and downstream states. As the brief submitted by the municipal *amici* demonstrates, the statutory scheme must provide some flexibility to accommodate both upstream and downstream state interests. Brief of The Association of Metropolitan Sewerage Agencies *et al.* as *Amici Curiae* at 7-14. Indeed, even Oklahoma agrees that some mechanism for accommodation must exist and suggests that EPA can "disapprove" downstream standards that would unreasonably affect upstream interests. Br. Opp. at 23. Unfortunately, both the courts and EPA have concluded that, under § 510 of the CWA, the Agency "is not authorized to disapprove a State water quality standard on the basis that EPA considers the standard to be too stringent." EPA, 54 Fed. Reg. 39,099 (Sept. 22, 1989); *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979). Adoption of the Tenth Circuit's position would therefore remove the only available mechanism for EPA to mediate interstate disputes over the application of conflicting water quality standards.

Finally, notwithstanding Oklahoma's wishful characterization, EPA does *not* support Oklahoma's position on this issue. The Tenth Circuit's decision effectively eliminates any Agency flexibility or discretion in applying downstream state standards, and EPA's petition clearly confirms that it is seeking review of the court's interstate holding. As EPA concluded, the Tenth Circuit's decision "has significantly undermined EPA's authority to implement the Clean Water Act by usurping EPA's role under the Act as arbiter of interstate water pollution disputes." EPA Pet. at 12-13. Consequently, even though EPA may advocate a somewhat different approach than the Arkansas petitioners, Oklahoma's characterization of EPA's position should be recognized as

nothing more than an attempt to obfuscate the court's radical departure from current practice.[2]

B. Respondents Fail to Explain Away The Conflict Created By The Tenth Circuit's Decision.

Respondents' rhetoric and superficial readings similarly fail to explain away the conflict between the Tenth Circuit's holdings and the decisions of this Court and other circuits. With respect to *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), Oklahoma dismisses this Court's detailed discussion of the issue as mere dicta. This "distinction" simply reflects a refusal to examine the substance of the Court's decision. The Supreme Court's preemption holding necessarily required the Court to interpret the Clean Water Act's provisions on the interstate application of water quality standards before the Court could decide whether these provisions conflicted with, and therefore preempted, the application of a downstream state's common law. *See* Ark. Pet. at 12 n.10. Thus, this Court's conclusion in *Ouellette* that a downstream state could not impose its standards under the CWA on out-of-state sources was an essential part of the Court's holding. In any event, lower courts are not free to disregard at will this Court's explanation of the law. *See Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part) (a statute that has been construed by the Supreme Court "acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself").

Respondents are equally mistaken in attempting to distinguish *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985), on the ground that it only dealt with state common law. Br.

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[2] In fact, respondents' brief is internally inconsistent on this issue. At some points in their brief, respondents do concede that EPA's "present position" would allow for "administrative balancing" between the downstream standard and "other considerations." Br. Opp. at 21-22.

Opp. at 19. In fact, this decision involved the interstate application of both Illinois common law *and* the Illinois water quality standards adopted under state statutes and approved under the Clean Water Act. 731 F.2d at 406. Furthermore, the Seventh Circuit held that a downstream state could not apply *either* its common law or its water quality standards against out-of-state sources. *Id.* at 414. In short, a fair reading of these and the other decisions addressed in Arkansas' petition demonstrates a substantial conflict in the precedent, which can only be resolved by this Court.

C. Respondents Cannot Artificially Limit The Tenth Circuit's Decision To An Interpretation Of Oklahoma Water Quality Standards.

Having won their own ban on any new Arkansas discharges that reach their border, Oklahoma now suggests that this ban might not apply in other states. While the ban on new permits that Oklahoma advocated below may have been confined in this manner, the Tenth Circuit made clear that it was adopting a much more sweeping holding than the argument advanced by Oklahoma. Indeed, in justifying its decision not to remand the case, the court explicitly stated that it was creating a new test, going far beyond the position advocated by Oklahoma, and that the parties "did not recognize the real significance of this issue." Ark. Pet. App. at 54a n.40.

The nationwide applicability of *the court's* permit ban is readily demonstrated by the court's opinion. Specifically, the court predicated the ban on its interpretation of the Clean Water Act, rather than on Oklahoma's non-degradation standard. *See, e.g.*, Ark. Pet. App. at 82a. The Tenth Circuit repeatedly relied on the intent of Congress and the legislative history of the CWA to justify its permit ban holding, without even referring to the intent of the specific Oklahoma standard involved in this case. *See, e.g., id.* at 83a ("the agency's decision is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, and frustrates the policy that Congress sought to implement").

See also id. at 76a, 78a-79a. In addition, the Tenth Circuit emphasized that the permit ban is triggered by a pre-existing violation of *any* relevant water quality standard.[3] *See, e.g., id.* at 54a, 75a. According to the court, EPA's failure to impose a permit ban upstream from an existing water quality violation was the "principal flaw in the agency's decision-making rationale." *Id.* at 75a.

In sum, regardless of what Oklahoma may have intended, the Tenth Circuit's permit ban is applicable to any stream with an existing violation of a water quality standard. Oklahoma's artificial construction therefore cannot avoid the severe nationwide impact described by Arkansas' petition and the *amicus* briefs. *See, e.g.*, Ark. Pet. at 27-29. In fact, the Tenth Circuit's holding already is being applied nationwide exactly as predicted by the Arkansas petition.[4]

D. The Permit Renewal Proceedings Do Not Diminish The Need For Immediate Review By This Court.

Respondents also suggest that this case is inappropriate for review because the Fayetteville facility's discharge permit is up for renewal and Arkansas, rather than EPA, is now the permitting agency. Br. Opp. at 25.

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[3] Furthermore, as explained in EPA's petition, even if the court's holding had been based on an interpretation of Oklahoma's non-degradation standard rather than the CWA, the holding would still have a dramatic nationwide impact because every state is required to adopt a similar non-degradation policy based on EPA's model standard. 40 C.F.R. § 131.12.

[4] For example, the U.S. Fish and Wildlife Service and other interest groups have submitted comments on a draft NPDES permit (AK-004978-6) in Alaska arguing that the permit must be denied because there is a pre-existing downstream violation of a relevant water quality standard, based specifically on the Tenth Circuit's decision. *See, e.g.*, Comments of U.S. Dept. of the Interior, Fish and Wildlife Service, to U.S. EPA, Region 10, Feb. 12, 1991. Thus, despite respondents' characterization, the Tenth Circuit's permit ban holding is already being used to block new permits throughout the nation, even in contexts that involve only a single state.

This suggestion is a red herring and has no bearing on the appropriateness of review. Respondents' own brief states that "the Court of Appeals' decision establishes the law to be applied in such subsequent proceedings." *Id.* In addition, Oklahoma has made clear its intention to use the Tenth Circuit's decision to block the renewal of the Fayetteville permit.[5] Moreover, Oklahoma does not point to any specific change in the Oklahoma standards or the other circumstances of the case that would make the Tenth Circuit's holdings less relevant or determinative in the permit renewal proceeding.

Thus, as a matter of law and fact, the permit renewal proceedings do not in any way moot the issues presented by Arkansas' petition. In addition to the factors discussed above, the Fayetteville plant's ability to continue operating during the lengthy renewal proceedings will depend on the legal validity of the existing permit. Absent review, Oklahoma will undoubtedly contend that the Tenth Circuit's decision requires the Fayetteville plant to immediately stop discharging into the Illinois River basin, forcing the plant to shut down. Consequently, even Oklahoma was ca[illegible] not to suggest that the Tenth Circuit's decision is [illegible]

Moreover, NPDES [illegible]mits are issued for a maximum of five years. Because evidentiary hearings on a permit are conducted after the permit is issued, and given the length of time it takes for judicial review after completion of the evidentiary hearings, there would almost never be time to get Supreme Court review of a permit decision if the time for review expires at the end of the five year permit period.

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[5] *See, e.g.*, Letter from Brita Haugland Cantrell, Assistant A.G. of Oklahoma to Arkansas Dept. of Pollution Control & Ecology, Dec. 21, 1990 (Oklahoma "preserves all rights won in *EPA v. Oklahoma*, 908 F.2d 595 (10th Cir. 1990) as applied to that permit and any successive permits for the Fayetteville discharge. This objection to the Fayetteville permit, upheld by the Tenth Circuit in that case, likewise applies to this draft Permit and any successive permits.").

Finally, the appropriateness of immediate review by this Court is reinforced by the tremendous consequences of these issues for the nation as a whole. With each day that passes, the Tenth Circuit's decision is exacerbating interstate conflicts, disrupting permit programs, jeopardizing the permits for countless public and private facilities across the nation, and otherwise creating intolerable uncertainty for the expenditure of scarce public resources. While Oklahoma's primary interest may be in preserving its victory in the court below, the rest of the country needs an immediate resolution by this Court.

E. The Facts Of This Case Confirm the Extreme Scope Of The Tenth Circuit's Decision.

While the factual context of this case is not critical for deciding the central legal issues presented, a balanced portrayal of the record before EPA demonstrates the extreme scope and consequences of the Tenth Circuit's decision.

For example, the quality of the Fayetteville effluent actually exceeds the quality of the Illinois River in Arkansas and Oklahoma, contrary to respondents' insinuation that the plant is polluting the river. At most, respondents presented evidence suggesting that the Fayetteville discharge may increase phosphorous levels in the Illinois River at the Oklahoma border by six pounds per day. Br. Opp. at 11.[6] However, respondents fail to mention that this small amount of additional phosphorous will be accompanied by a proportionally much larger increase in water flow, since most of the water discharged by the Fayetteville facility originally came from outside the Illinois River basin.

The concentration of phosphorous and other substances in the Fayetteville effluent will therefore actually be lower than in the Illinois River at the point of confluence. Thus,

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[6] *Every* expert who testified at the permit hearings concluded that the Fayetteville effluent would result in no change in any observable parameter of water quality. *See, e.g.*, Ark. Pet. App. at 130a-132a.

the Fayetteville discharge will result in a net dilution of pollutants in the river and actually improve water quality by, for example, increasing dissolved oxygen levels. Ark. Pet. App. at 139a. Moreover, EPA's expert witness at the hearings on the Fayetteville permit testified that the facility's discharge will improve Oklahoma water quality because it "will result in much less algal growth in Lake Frances and improved water clarity in the Illinois River below Lake Frances as well as benefiting Lake Tenkiller." Rebuttal Testimony of Jack H. Gakstatter, EPA Office of Research & Development (Index No. EPA-4, Log. No. 121, p. 5).

The fact that the Tenth Circuit's decision would now prevent the City of Fayetteville from operating its $40 million state-of-the-art plant further demonstrates the extreme nature of the Tenth Circuit's holdings. As even the Oklahoma Department of Health acknowledged, the Fayetteville plant incorporates "the most thorough and complete treatment currently available." Ark. Pet. App. at 105a. There is absolutely no question that the new Fayetteville facility is environmentally superior to the previous plant it has replaced. Allowing Oklahoma to block this improvement simply cannot be reconciled with the purposes and objectives of the CWA.

CONCLUSION

For the foregoing reasons, and for those stated in the petitions, a writ of certiorari should be granted.

Respectfully submitted,

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March 15, 1991

Supreme Court, U.S.
FILED
MAR 11 1991
OFFICE OF THE CLERK

Nos. 90-1266, 90-1262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE STATE OF MONTANA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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March 11, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE STATE OF MONTANA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The State of Montana submits this brief as *amicus curiae* in support of the petitions by the Environmental Protection Agency and the State of Arkansas, *et al.*, for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.[1]

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[1] Because this *amicus* brief is submitted by the Montana Attorney General on behalf of the State, it does not require the consent of the parties pursuant to Supreme Court Rule 37.5.

INTEREST OF THE AMICUS CURIAE

The State of Montana respectfully requests this Court to grant a writ of certiorari to review the decision by the United States Court of Appeals for the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990). The primary issue presented by the Tenth Circuit's decision is the legal significance of the water quality standards of downstream states for the permit applications of out-of-state sources. By requiring such sources to strictly comply with downstream state standards, the Tenth Circuit adopted an approach that is inconsistent with the decisions of this Court and other courts. Hence, the Tenth Circuit's decision threatens to cause tremendous confusion about the applicable standards in permitting decisions and disrupt the planning process for new industrial and municipal facilities.

Montana is one of the States that may be significantly affected by the Tenth Circuit's decision. Numerous streams and rivers flow from Montana into adjoining states, and most industrial and municipal dischargers in the State are located along interstate waterways or tributaries of such waterways. These facilities have received discharge permits based on their compliance with the federally-approved water quality standards of Montana. The Tenth Circuit's decision imposes substantial uncertainty and risk for both public and private dischargers in the State of Montana, particularly to the extent that one or more downstream states adopt stricter water quality standards than Montana's own federally-approved standards.

The Tenth Circuit's decision will also disrupt, in varying degrees, the National Pollutant Discharge Elimination System (NPDES) permitting program of Montana and other states. Montana has been delegated the authority to issue Montana Pollutant Discharge Elimination System (MPDES) permits by the U.S. Environmental Protection Agency (EPA) under the Clean Water Act

(CWA). CWA § 402(b), 33 U.S.C. § 1342(b). The Tenth Circuit's decision will require Montana's permitting agency, the Department of Health and Environmental Sciences, to carefully survey downstream state water quality standards and to apply these standards as well to permit applications involving proposed discharges to interstate waterways. In general, the increased complexity and informational requirements resulting from the Tenth Circuit's decision will impose major new administrative burdens on states with approved permitting programs such as Montana's.

The State of Montana therefore strongly urges this Court to grant certiorari and resolve the conflict on the extraterritorial reach of downstream state water quality standards to out-of-state facilities.

STATEMENT

This case involves the NPDES permit issued by EPA to a new municipal wastewater treatment plant in the City of Fayetteville, Arkansas. EPA had issued the permit based on a finding that the proposed discharge from the Fayetteville facility would have no detectable impact on the water quality of the downstream state of Oklahoma. 908 F.2d at 632. The Tenth Circuit overturned EPA's decision to approve the permit. The court held that an out-of-state facility was required to comply strictly with the water quality standards of all downstream states. *Id.* at 615.

Moreover, the court also held that the permitting agency for the source state has no flexibility in interpreting and applying the water quality standards of a downstream state. *See id.*, at 615-20. Here, the Tenth Circuit concluded that the Fayetteville permit must be denied because it would violate Oklahoma water quality standards, even though the court did not disturb EPA's finding that the proposed discharge would have no detectable effect on Oklahoma water quality. *Id.* at 632.

REASONS FOR GRANTING THE WRIT

I. REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE CONFLICT BETWEEN THE HOLDING OF THE TENTH CIRCUIT AND THE DECISIONS OF THIS AND OTHER COURTS ON THE EXTRATERRITORIAL APPLICATION OF STATE WATER QUALITY STANDARDS.

The Tenth Circuit's holding on the extraterritorial application of state water quality standards is inconsistent with the result reached in every other case where this issue has been presented. In particular, two decisions by this Court have strongly endorsed the principle that one state cannot regulate sources in an adjoining state. In *City of Milwaukee v. Illinois*, 451 U.S. 304, 328 (1981), this Court concluded that a state could adopt water quality standards that were stricter than the federal criteria, but could only apply those standards to in-state dischargers. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), this Court made its views unequivocally clear that a downstream state could not block an out-of-state permit.

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. . . . [A]n affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. . . . Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program.

Id. at 490-91.

Other courts have reached the same conclusion. The Seventh Circuit concluded that applying a downstream state's water quality standards or common law against an out-of-state facility "would lead to chaotic confrontation between sovereign states." *Illinois v. City of Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985). Such a rule would make it "virtually impossible to predict the standard for a lawful discharge into an interstate body of water." *Id.* The Tennessee Supreme Court issued a similar decision in a case in which Tennessee was trying to apply its water quality standards to regulate a discharge in North Carolina. *Tennessee v. Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986), *remanded*, 479 U.S. 1061 (1987). The court held that each state "clearly operates within the sphere of its own jurisdiction, and may not . . . control points of discharge lying within the jurisdiction of other states." *Id.* at 574.

These decisions by this Court and several lower courts established a uniform rule that a downstream state cannot regulate out-of-state dischargers. The Tenth Circuit's decision now creates a new conflict on this issue. It directly contradicts the conclusions reached by other courts in holding that an out-of-state source must strictly comply with the water quality standards adopted by a downstream state. Review by this Court is needed to resolve this conflict and definitively clarify the extraterritorial applicability of state water quality standards.

II. THE CONFUSION CREATED BY THE TENTH CIRCUIT'S HOLDING WILL DISRUPT STATE PERMIT PROGRAMS AND CAUSE MAJOR UNCERTAINTIES FOR EXISTING AND NEW DISCHARGERS.

The confusion created by the Tenth Circuit's novel holding on the interstate application of water quality standards is potentially very disruptive for both permitting agencies and permit applicants. The petitions filed by EPA and the State of Arkansas describe the

disruption that the Tenth Circuit's decision will cause for affected states. Based on the clear guidance provided by the existing case law prior to the Tenth Circuit's decision, states had issued permits, and dischargers had constructed their facilities, to comply with the water quality standards of the source state only. The Tenth Circuit's decision now creates substantial doubt about whether permits must also ensure compliance with downstream state water quality standards.

For Montana, the Tenth Circuit's ruling will require continual monitoring and review by agency staff of the water quality standards of downstream states. More importantly, if any downstream state adopts a very strict standard for a parameter such as phosphorus, the administrative workload in determining whether the facility under application for a MPDES permit or MPDES permit renewal can meet the standard will increase dramatically. The effect on the facility under review could range from permit denial to significant and limiting conditions on both the method and rate of discharge from the facility. Finally, the uncertainty about having to meet downstream state water quality standards also adversely affects the public and private holders of discharge permits in Montana because normal business planning requires predictability about the applicable standards that must be met.

Given the clear conflict between the decision of the Tenth Circuit and the decisions of other courts, including this Court, states and dischargers will have no clear guidance about whether downstream state standards are to be applied to regulate out-of-state sources. This confusion and the harm it may create can only be avoided if this Court grants certiorari and once and for all clearly defines the extraterritorial applicability of state water quality standards.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the Tenth Circuit.

Respectfully submitted,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF CHAMPION INTERNATIONAL CORPORATION, AMERICAN PAPER INSTITUTE, NATIONAL FOREST PRODUCTS ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, THE FERTILIZER INSTITUTE, AND ARKANSAS POULTRY FEDERATION IN SUPPORT OF PETITIONERS

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March 11, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-1266 and 90-1262

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

THE STATE OF OKLAHOMA, *et al.*,
Respondents,

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF *AMICI CURIAE* OF CHAMPION INTERNATIONAL CORPORATION, AMERICAN PAPER INSTITUTE, NATIONAL FOREST PRODUCTS ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, THE FERTILIZER INSTITUTE, AND ARKANSAS POULTRY FEDERATION IN SUPPORT OF PETITIONERS

I. INTRODUCTION

Champion International Corporation, the American Paper Institute, the National Forest Products Association, the American Iron and Steel Institute, The Fertilizer Institute, and the Arkansas Poultry Federation ("Industry *amici*") file this brief *amici curiae* in support of Petitioners. The consent of counsel for each of the parties has been obtained and a letter from each counsel indicating his consent has been filed with the Clerk. Industry *amici* represent private industrial and manufacturing companies who are affected by the lower court's rulings interpreting the Clean Water Act, but whose interests are separate and distinct from those of the federal agency and Arkansas public agency petitioners and whose circumstances are not the same as those of the particular municipal facility and the particular water quality circumstances at issue in this case.

Industry *amici* concur in the two questions presented by the petition of the State of Arkansas, *et al.* Industry *amici* also concur in the first and third questions presented by the petition of the Environmental Protection Agency.

The Clean Water Act issues addressed in the petitions for writ of *certiorari* are of great importance to industrial facilities which currently discharge or will in the future need to discharge treated process wastewater to interstate waterways. Industry *amici's* brief focuses on Clean Water Act statutory considerations and effects of the lower court's rulings which are supplementary to those set forth in the petitions. These additional considerations demonstrate that, in giving mandatory, extra-territorial effect and preeminent status to the federally approved water quality standards of downstream states, the Tenth Circuit erroneously interpreted the Clean Water Act as allowing downstream states to override the standards-setting policy choices and permitting decisions of source states. These considerations also demonstrate that the lower court erroneously restricted the exercise of federal discretion to resolve disputes among states concerning water quality standards applicable to discharges to interstate waterways. If allowed to stand, the Tenth Circuit's rulings—which do great violence to this Court's construction of the Clean Water Act in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ("*Ouellette*")—will create tremendous chaos in the administration of the Act, causing heretofore unimaginable difficulties in the permitting of industrial discharges to interstate waterways and their tributaries.

II. INTERESTS OF *AMICI CURIAE*

The effects of the Tenth Circuit's statutory rulings go far beyond the two states, the particular municipal wastewater treatment facility, and the particular interstate river basin at issue in this case. The lower court's rulings could affect literally thousands of rivers and streams, lakes and reservoirs, bays, estuaries, and coastal waters nationwide which form common boundaries between states or which flow from one state through one or more other states. Thousands of industrial facilities discharging to these interstate waterways and their tributaries, in conformance with the Clean Water Act as previously construed by this Court and by numerous lower courts, are potentially affected by the Tenth Circuit's unprecedented, absolutist interpretations of the Clean Water Act.

The American Paper Institute is a non-profit trade association whose members include companies which account for approximately 90 percent of the domestic manufacture of pulp, paper, and paperboard, and most of whom own or operate facilities which discharge treated process wastewater to interstate waterways or their tributaries pursuant to various requirements of the Clean Water Act.

Champion International Corporation ("Champion") is a member of the American Paper Institute and one of the

nation's largest producers of pulp, paper, and solid wood products. Champion owns and operates numerous mills and other facilities in North Carolina, Michigan, and Florida, among other states, which discharge treated process wastewater to interstate rivers or bays in accordance with the Clean Water Act (the "Act"), 33 U.S.C. §§ 1251, *et seq.*, as implemented through permits issued under the Act's National Pollutant Discharge Elimination System ("national discharge" or "NPDES" permits). Champion's Canton, North Carolina process wastewater discharge, in particular, has been the subject of a long-standing water quality standards dispute between the states of North Carolina and Tennessee. Because of that dispute and based on Tennessee's recommendations, in 1985 the U.S. Environmental Protection Agency ("EPA") took away from North Carolina the authority to issue a national discharge permit for the Canton mill. In another aspect of that dispute in 1986, the Supreme Court of Tennessee ruled—consistent with the opinion of the Seventh Circuit in *Illinois v. Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984)—that Tennessee could not bring an action to enforce its state water quality standards and common law remedies against Champion's North Carolina mill for allegedly polluting the Tennessee portion of an interstate waterway. *State v. Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986).[1] Champion is currently a petitioner before the U.S. Court of Appeals for the Fourth Circuit regarding an EPA-

[1] In 1987, this Court granted Tennessee's petition for writ of *certiorari*, vacated the judgment of the Tennessee Supreme Court and remanded the case for further consideration in light of this Court's decision in *Ouellette*. *Tennessee v. Champion Int'l Corp.*, *cert. granted, judgment vacated and remanded*, 479 U.S. 1061 (1987). By order dated May 21, 1987, the Supreme Court of Tennessee, at the request of the state, granted a voluntary nonsuit, without prejudice to any claims Tennessee might assert under the Clean Water Act as construed by this Court in *Ouellette*. No subsequent state law enforcement action has been brought by the State of Tennessee regarding the Canton mill discharge.

issued NPDES permit for the Canton mill, in which EPA's reliance on Tennessee's federally approved narrative water quality standard for color is at issue.[2]

Champion also operates a mill in Florida which discharges wastewater to a stream that empties into Perdido Bay, a boundary water between Alabama and Florida. The Attorney General of Alabama has filed a request for an evidentiary hearing on a recent EPA-issued NPDES permit for Champion's Florida mill. The basis of Alabama's request is that, contrary to the Tenth Circuit's decision below, the EPA-issued permit fails to insure compliance with Alabama's water quality standards, including its nondegradation policy. EPA has not yet ruled on whether to grant Alabama's request for a hearing.

The National Forest Products Association, of which Champion also is a member, is a non-profit association whose members include individual companies and other trade associations accounting for much of the timber managed and most of the timber harvested and solid wood products manufactured in the United States.

The American Iron and Steel Institute is a non-profit trade association whose members include companies which account for approximately 80 percent of domestic raw steel production, many of whom own or operate facilities which

[2] *Champion Int'l Corp. v. EPA*, No. 91-2302 (4th Cir. *petition filed* Jan. 3, 1991). In rejecting Champion's request for an evidentiary hearing on the applicability of *North Carolina's* color standard in September 1990, the EPA Administrator specifically cited and relied upon the Tenth Circuit's holding in *State of Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990). *See also Champion Int'l Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988). Champion is now challenging directly in the Fourth Circuit EPA actions taken in 1989 and 1990—*without* a finding of "undue impact on interstate waters"—rejecting North Carolina's narrative color standard as the basis for a color limitation in the EPA-issued Canton mill permit. The first question presented by the State of Arkansas, *et al.* in their petition herein thus also will be squarely presented in a brief due to be filed by Champion with the Fourth Circuit in the near future.

discharge treated process wastewater to interstate waterways or their tributaries.

The Fertilizer Institute is a non-profit trade association consisting of approximately 300 member companies which manufacture over 90 percent of all domestically produced fertilizers. The association's members operate thousands of facilities for the production, formulation, distribution, and sale of farm, lawn and garden fertilizers, many hundreds of which currently discharge, in conformance with the Clean Water Act, to interstate waterways or their tributaries.

The Arkansas Poultry Federation includes more than 1600 poultry growers, producers, and processors with operations in Arkansas, which together constitute a substantial sector of Arkansas industry. Members of the Arkansas Poultry Federation are major industrial dischargers into publicly-owned treatment works in Northwest Arkansas, including Fayetteville. In addition to their interest in Clean Water Act requirements affecting the discharge of their industrial wastewater, members of the Arkansas Poultry Federation are interested in clean water issues because they require an abundance of high-quality water in their poultry production and processing activities.

Two unprecedented Clean Water Act rulings of the Tenth Circuit—that Clean Water Act discharge permits must always insure compliance with federally approved downstream state water quality standards, and that the Act absolutely bans any new or increased discharges to waterways not currently meeting applicable water quality standards—have a direct and potentially devastating effect on Clean Water Act discharge permits for industrial discharges to interstate waterways and their tributaries. If the lower court's construction of the Act is allowed to stand, many existing permits for industrial discharges to interstate waterways may well be deemed deficient, and thus may be subject to more stringent discharge limitations

or prohibitions. Industrial facilities across the nation, such as those of *amici*, as well as publicly-owned facilities, face the prospect of having to curtail their existing permitted discharges (as determined pursuant to federally approved source state water quality standards) or—like the City of Fayetteville's new wastewater treatment facility—the prospect of being unable to obtain new permits to discharge (and thus to operate) at all.

III. SUMMARY OF ARGUMENT

In the name of always assuring compliance with EPA-approved downstream state water quality standards, irrespective of where the discharge source is located, the Tenth Circuit held that

> "no discharge to a navigable water . . . may be permitted unless compliance with all applicable water quality requirements, including the federally approved standards of affected downstream states, is assured."

State of Oklahoma v. Environmental Protection Agency, 908 F.2d 595, 615 (10th Cir. 1990). The lower court thus swept aside express provisions of the Clean Water Act which *do not mandate* compliance with downstream state water quality standards, whether federally approved or not. Section 303(c)(3) of the Act explicitly provides that a federally approved state water quality standard "shall thereafter be the water quality standard for the applicable waters of that State." No other provision of the Clean Water Act, including the "interstate dispute resolution" provisions of §§ 401(a)(2) and 402(d)(2), extends the mandatory reach of federally approved state water quality standards beyond the waters "of that State." The Tenth Circuit also rejected this Court's construction of the Act in *Ouellette*, in which this Court recognized the paramount status of a source state's water quality standards and recognized as well that any *exceptional* EPA decision to base an out-of-state source's discharge limitations on down-

stream state law requirements is, at most, *discretionary*, *i.e.*, any such EPA decision must be preceded by an EPA finding of "undue impact on interstate waters."

The Tenth Circuit's second unprecedented Clean Water Act interpretation, that

> "where water quality standards violations are already occurring in the receiving waters, no additional point source discharge to those waters may be permitted if it would contribute [even by an undetectable amount] to the condition that produced the violations . . ." (908 F.2d at 634),

is based on an equally flawed reading of the Clean Water Act as imposing an absolute prohibition on any new or increased discharges to a waterway that is not currently meeting applicable water quality standards. Even assuming the lower court's first ruling regarding the mandatory compliance status of downstream state standards is correct (which it is not), the Act does not prohibit absolutely all new or increased discharges to waterways not currently meeting water quality standards. Although stringent conditions are required in permitting new or increased discharges, the statute has never been read to forbid categorically any new or increased discharges to such waters.

IV. ARGUMENT

Primary focus is given in this brief to the lower court's legal interpretation that the Clean Water Act mandates compliance in all cases with the federally approved state water quality standards of any affected downstream state.[3]

[3] It is unnecessary to address the lower court's findings and conclusions regarding alleged non-compliance with Oklahoma's standards if, contrary to the lower court's ruling, a Clean Water Act discharge permit issued to a source located in Arkansas is not always required to insure compliance with the downstream state standards of Oklahoma (*i.e.*, in the absence of an exceptional EPA finding of "undue impact on interstate waters"). EPA made no such "undue impact" determination with respect to the Fayetteville discharge, and an appellate court lacks the authority to make such a determination in the first instance. Industry *amici* support, without repetition here, the assertions made in EPA's petition for *certiorari* that the Tenth Circuit seriously deviated from well established principles governing judicial review of agency actions, including the lower court's *ad hoc* interpretation of Oklahoma's standards and the court's findings *de novo* of an unacceptable impact on Oklahoma waters.

A. The Tenth Circuit's Unprecedented Requirement Of Mandatory Compliance With Downstream State Standards Conflicts With This Court's Prior Construction Of The Act And Should Be Reviewed By This Court

Section 303(c)(3) of the Act, 33 U.S.C. § 1313(c)(3), contains an unambiguous statement of federal law concerning the territorial reach of federally approved state water quality standards:

> If the [EPA] Administrator . . . determines that such [a state-adopted new or revised water quality] standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State.

Understandably, given this clear statutory language, no court previously has read these words—or any other words of the Act—to require that the federally approved water quality standards of a particular state always must be met by discharges which may affect that state's waters but which originate outside that state's boundaries.

1. The Tenth Circuit's Interpretation Conflicts With This Court's Construction of the Act In *Ouellette* And Will Create Chaos in the Administration Of the Act

The Tenth Circuit's ruling regarding the mandatory compliance status of downstream state water quality stand-

ards cannot be reconciled with this Court's prior construction of the Clean Water Act. Although *Ouellette* struck down the extra-territorial enforceability of a downstream state's common law of nuisance, rather than a downstream state's water quality standards, this difference is not crucial to deciding whether the Court's extensive consideration and construction of the Act in *Ouellette* should apply here and thus strike down the lower court's mandatory, extra-territorial enforcement of downstream state water quality standards. Indeed, this Court explicitly recognized in *Ouellette* that, in disputes among states concerning applicable *water quality standards*, an EPA finding of "undue impact on interstate waters" is necessary in order to provide EPA the authority to disapprove a source state's proposed permit standards and to, in effect, treat a downstream state water quality standard as if it were a federally promulgated standard.[4]

Application of this Court's construction of the Act in *Ouellette* to the issue presented here also is consistent with this Court's extensive discussion in that case of the Clean Water Act regulatory scheme and the Act's goals and policies. Among the important purposes and objectives of

[4] 479 U.S. at 490-91. Industry *amici* submit that, in order for EPA to give federal effect to downstream state water quality standards in the context of resolving an interstate water quality standards dispute, EPA must comply with procedural requirements akin to those associated with federal standards promulgation under § 303(c)(4) of the Act, 33 U.S.C. § 1313(c)(4). Indeed, it is difficult to distinguish, in substance or effect, an EPA decision resolving an "applicable standards" dispute concerning discharges to an interstate waterway from an EPA determination that it is necessary to promulgate "federal standards" for that waterway under § 303(c)(4). Like setting federal standards under § 303(c)(4), EPA's resolution of an interstate "applicable standards" dispute results in the designation of certain standards which will be generally applicable to all present and future discharges to that particular waterway. There is no reason to believe the Act allows EPA to simply *declare*, without more, that certain standards will govern all present and future discharges to a particular interstate waterway.

the Act, as this Court recognized in *Ouellette*, is to allow the *source state* considerable discretion to administer the national discharge permit program and make "policy choices" necessary to implement the Act's substantive requirements. 479 U.S. at 495. Concomitantly, downstream states whose waters may be affected are granted only a limited right to "interfere" with the source state's policy choices and permit decisions.[5] Downstream states are *not* authorized, in the words of this Court, to "effectively override," either directly or indirectly, the policy choices made by the source state in setting its standards in conformance with the Act. 479 U.S. at 495.

In giving downstream state standards mandatory compliance status vis-a-vis out-of-state sources, however, the lower court would authorize downstream states to regulate the conduct of out-of-state sources through the establishment of downstream state standards more stringent than those of the source state and thereby directly and severely interfere with the source state's policy choices and permit decisions. Moreover, since EPA may not disapprove state standards more stringent than those necessary to meet the Act's requirements (§ 510 of the Act, 33 U.S.C. § 1370), downstream states would be able to override discretionary policy choices and permit decisions which even EPA might otherwise make in the context of resolving interstate water quality standards disputes. Ultimate authority thus would be conferred not on the source state and EPA, as the Act directs and this Court recognized in *Ouellette*, but on any affected downstream state which chose to adopt a more stringent standard than the Act requires.

In contrast to not allowing downstream states to "circumvent" the national permit system through the extra-territorial enforcement of downstream state nuisance laws, which was forbidden by this Court in *Ouellette*, the Tenth

[5] See discussion of §§ 401(a)(2) and 402(d)(2) of the Act at pages 13-16, *infra*.

Circuit's decision here would allow a downstream state to *use* the national permit system to enforce its more onerous water quality-related requirements against an out-of-state source and thereby avoid or reduce the burdens that otherwise might have to be imposed on its own resident industries and municipalities.[6] The competing public and private interests of neighboring states, to the often considerable extent they are affected by water quality considerations, thus would be shifted in favor of downstream states, contrary to the clear policy mandate of the Clean Water Act.

This Court also emphasized in *Ouellette* the "important goals of efficiency and predictability" in the national permit system, under which Congress intended EPA and the states to establish "clear and identifiable" discharge standards. 479 U.S. at 496. No less than the multiplicity of often vague common-law nuisance rules to which a discharger might have been subject had *Ouellette* been decided in favor of downstream states, subjecting discharges in one state to the frequently differing and often vague state water quality standards of downstream states would create a highly inefficient, unpredictable, and chaotic national permit system. *Cf.* 479 U.S. at 496-97, quoting from *Illinois v. Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984).

Moreover, most companies operating and discharging in one state heretofore would have had no particular reason to be *informed* about the water quality standards of downstream states, much less have had the need or the opportunity to participate in their standards-setting processes. To now say, all of a sudden, that such out-of-state facilities are always subject to *previously-adopted* downstream state standards, without notice and opportunity to have been

[6] The Tenth Circuit, in fact, expressly conceded that it would allow downstream states' policy choices to override those of source states, so as not to impose a "disproportionate burden" on downstream state discharges. 908 F.2d at 606.

heard regarding the adoption of such standards, offends not only the standards-setting scheme of § 303 of the Clean Water Act but it also offends procedural due process requirements associated with standards-setting under § 303 of the Act and similar state law requirements. With respect to present and future state standards-setting activities, the Tenth Circuit's ruling means that every industrial discharger to an interstate waterway will have to determine the possible downstream state implications of its discharge (including any possible effects which may be *undetectable*), participate in the standards-setting processes of *all* such potentially affected downstream states, and attempt to insure (if possible) that the downstream states' standards do not conflict with those of the state where the source is located.

2. The Tenth Circuit's Interpretation Creates An Implausible Inconsistency In The Act And Robs EPA Of Any Effective Discretion To Resolve Interstate Water Quality Standards Disputes

Beyond § 303(c)(3) of the Act, the provisions of the Act most relevant to determining the compliance status of downstream state water quality standards are §§ 401(a)(2) and 402(d)(2) of the Act, 33 U.S.C. §§ 1341(a)(2) and 1342(d)(2), which specifically govern EPA's resolution of disputes among states concerning water quality standards applicable to discharges to interstate waterways.

Section 402(d)(2), in conjunction with § 402(b)(5), specifies the EPA interstate dispute resolution process which applies when a delegated state agency is the national discharge permit-issuing authority. Under § 402(d)(2), as this Court clearly articulated in *Ouellette*:

> [A]n affected [downstream] State does not have the authority to block the issuance of the [source state proposed] permit if it is dissatisfied with the proposed standards [of the source state]. An affected State's only recourse is to apply to the

> EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharge will have an undue impact on interstate waters.

479 U.S. at 490-91.

Section 401(a)(2), on the other hand, specifies the EPA interstate dispute resolution process which applies when EPA itself (as in the instant case) is the national discharge permit-issuing authority. Under § 401(a)(2) as well, as this Court indicated in *Ouellette*:

> Even though it may be harmed by the [source state] discharges, an affected [downstream] State only has an advisory role in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given [the limited rights to] notice and the opportunity to object to the proposed standards at a public hearing.

479 U.S. at 490.

Thus, concerning the Act's overall interstate dispute resolution processes, this Court determined in *Ouellette* that "affected [downstream] States occupy a subordinate position to source States in the federal regulatory framework." 479 U.S. at 491.

The Tenth Circuit, however, would give downstream states which have chosen to adopt water quality standards more stringent than federal law requires (or more stringent than the source state's standards) a *preeminent* position in the federal regulatory framework, principally through an expansive interpretation of § 401(a)(2) of the Act.[7] A critical issue raised by the lower court's interpre-

[7] "[W]e consider 33 U.S.C. § 1341 [§ 401 of the Act] particularly persuasive." 908 F.2d at 609. The Tenth Circuit also found support for its conclusion regarding the preeminence of downstream state standards in §§ 301(b)(1)(C) and 505(h) of the Act, 33 U.S.C. §§ 1311(b)(1)(C) and 1365(h). 908 F.2d at 606, 614-15. The lower court's interpretation of § 301(b)(1)(C), that more stringent limitations arising from the EPA-approved water quality standards of *all* states *must* be met, however, flatly contradicts the court's own acknowledgment of the *discretionary* nature of applying an affected downstream state's standards under the Act's interstate dispute resolution provisions. 908 F.2d at 611. Section 505(h) of the Act, 33 U.S.C. § 1365(h), which authorizes a downstream state whose water quality requirements are being violated to bring suit to compel EPA to enforce an "effluent standard or limitation" established under the Act, presupposes that EPA has failed to enforce a *federally promulgated* effluent standard or limitation or failed to enforce a federally enforceable effluent standard or limitation adopted (and implemented through a § 402 permit or § 401 certification) *by the source state*. Neither of these provisions supports the notion that EPA can be compelled by a downstream state to enforce against an out-of-state source the *downstream state's* non-federally promulgated water quality standards or effluent standards and limitations.

tation, but which the court's decision fails to address satisfactorily, is the inconsistency that would arise in how "applicable standards" disputes among states concerning discharges to interstate waterways are to be resolved depending on whether EPA is the permit-issuing authority (and § 401(a)(2) applies with respect to downstream state requirements) or a source state is the permit-issuing authority (and § 402(d)(2) applies with respect to downstream state requirements).

As interpreted by the Tenth Circuit, § 401(a)(2) would *require* that an EPA-issued permit contain conditions necessary to insure compliance with all applicable federally approved water quality requirements of affected downstream states. As indicated by this Court in *Ouellette*, however—and acknowledged by the court below as well (908 F.2d at 611)—when a source state is the permit-issuer and EPA is exercising its *discretionary* review and objection authority under § 402(d)(2), EPA obviously is *not required* to object to the source state-proposed permit if it fails to insure compliance with applicable water quality require-

ments of affected downstream states.[8] Thus, EPA would have no discretion regarding downstream state requirements if EPA itself issued the permit, but would have discretion if the source state issued the permit.

The Tenth Circuit attempts to deal with this implausible inconsistency, at least indirectly, by taking the position—in light of EPA's discretion to waive its objection authority under § 402(d)(3) of the Act—that EPA's discretionary authority under § 402(d)(2), when the source state is the permit-issuer, extends only to EPA's decision on whether or not to review a particular source state-proposed permit at all. 908 F.2d 611, n.19. According to the Tenth Circuit, § 402(d)(2)—like the court's interpretation of § 401(a)(2)—thus *requires* EPA, once it decides merely to *review* a source state-proposed permit, to insist that the permit comply with all applicable federally approved water quality requirements of affected downstream states. This means, of course, that EPA would not actually have any "undue impact" discretion to exercise once EPA decided to "review the impact" of the proposed discharge. Contrary to this Court's discretionary "undue impact" standard in *Ouellette* concerning § 402(d)(2) review, EPA's review of the proposed discharge under the lower court's interpretation would be limited to simply confirming whether or not downstream state water quality standards or other requirements would be violated.

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[8] Moreover, if the source state declines to modify the proposed permit in order to satisfy an EPA objection based on a downstream state's "recommendation," and EPA takes over permit-issuing authority for the facility (as in the instance of Champion's Canton, North Carolina mill permit, noted previously), EPA still is *not required* by the statute to insure compliance with an affected downstream state's applicable water quality requirements. Section 402(d)(4) of the Act directs EPA to issue a permit in this instance "in accordance with the guidelines and requirements of this chapter," without any explicit or implicit reference to the water quality requirements of downstream states.

There is no basis in the Act—or in this Court's construction of the Act's purposes, objectives, and interstate dispute resolution processes in *Ouellette*—to believe, as the Tenth Circuit would have it, that EPA's role in issuing permits for discharges to interstate waters and EPA's role in arbitrating applicable water quality standards disputes concerning discharges to interstate waters was intended by Congress to be reduced to a mechanical process of simply applying, whenever they are more stringent, the EPA-approved standards of downstream states. In summary, there is no basis for the lower court's conclusion that downstream state standards occupy a position of preeminence in the federal regulatory framework.

B. The Tenth Circuit's Absolute Prohibition Of New Discharges To Waters Not Meeting Water Quality Standards Lacks A Proper Statutory Basis And Warrants Supreme Court Review

Compounding the error of its initial misreading of the Act as giving preeminent status to downstream state standards, the Tenth Circuit also misread the Act as absolutely prohibiting any new or increased discharges to a waterway which is not currently meeting the downstream state's (or the source state's, it would appear) applicable water quality standards.

While it is undeniable, as the lower court noted, that a stated "goal" of the Act is the complete elimination of discharges of pollutants, and that any individual state may indeed strive for the "utter abolition" of discharges of pollutants (908 F.2d at 631, citations omitted), it is equally undeniable that the Act allows each state to decide for itself how far and how fast it will move towards achieving that goal. By allowing a downstream state's policy choice to utterly abolish discharges into *it's* portion of an interstate waterway to govern discharges occurring in an upstream state, in pursuance of the Act's total elimination "goal," the lower court would effectively allow the down-

stream state to utterly abolish discharges into the *upstream state's* portion of the interstate waterway, whether or not that was the upstream state's present policy choice. The Act has never been interpreted by EPA, or by any court heretofore, to require such an absolute ban on new or increased discharges, whether at the behest of a downstream state or not.

In support of its conclusion that such a prohibition exists in the Act and bolsters the lower court's interpretation of Oklahoma's standards, the Tenth Circuit relied almost exclusively upon its "common sense" understanding of the Act's goals and purposes and the "absurdity" of a policy that would allow a new discharge—including one whose individual impact is undetectable—to be made into a waterway which is not currently meeting applicable water quality standards. 908 F.2d at 631-32. With all due respect for the common sense of the lower court, the absence of "an *explicit* imprimatur" in the statute (908 F.2d at 632 (emphasis in original)) for the court's *absolutist* ruling obviously cannot be overlooked. The "national goal" of eliminating the discharge of pollutants into navigable waters by 1985, 33 U.S.C. § 1251(a)(1), upon which the lower court placed so much emphasis (908 F.2d at 630-32), has not been achieved by 1991 and by many accounts may not ever be achieved. Nor should undue weight be given to the equally slippery notion adopted by the Tenth Circuit that EPA's "watchful role" and other responsibilities as custodian of the navigable waters is sufficient to "subsume the power [or duty] to prohibit any new discharge of pollution, regardless of the magnitude of its impact, where the existing quality of the receiving waters does not meet required standards." 908 F.2d at 634.

How can EPA's powers or duties under the Act be so apparently *unlimited* when it comes to prohibiting new discharges, but be so *limited* when it comes to determining the applicable standards for discharges to interstate waterways? Industry *amici* submit that, based on the judgmental

and balancing processes set out in the statutory language itself, rather than absolutist notions imported into the statute, the Tenth Circuit got it exactly backwards. The statute explicitly grants EPA discretion to determine the applicable water quality standards for discharges to interstate waterways when a dispute arises among neighboring states. The statute, on the other hand, imposes no strict duty and confers no broad authority upon EPA to ban all new or increased discharges to waterways not currently meeting applicable water quality standards.

Indeed, the breadth of EPA's duties and the scope of EPA's authority in both of these respects cannot be more aptly described than by asking, in the words of this Court in *Ouellette*: Does the proposed discharge, in EPA's judgment, have an "undue impact" on the waters in question? In other words, requiring EPA to apply automatically the more stringent standards adopted by downstream states (or stay completely out of the interstate dispute, and thus defer to the source state), and requiring EPA to ban absolutely any new discharges to waterways not currently meeting the applicable standards, robs EPA of the judgmental and balancing role which Congress intended EPA to have under the Act, as recognized by this Court in *Ouellette*. Judicial review of EPA's exercise of that discretion, based upon a proper record of EPA's decision, is available to protect aggrieved parties against possible abuse.

V. CONCLUSION

The Tenth Circuit's grant of automatic, mandatory compliance status to the federally approved state water quality standards of all affected downstream states—giving them preeminent status over federally approved source state standards—is contrary to the Clean Water Act and this Court's construction of the Act in *Ouellette*. In disputes among states concerning the water quality standards applicable to discharges to interstate waterways, Congress

authorized EPA to review the standards in dispute and to determine, before giving federal effect to any downstream state standards or requirements, whether the proposed discharge would have an undue impact on interstate waters. In the absence of such an EPA finding, compliance with the water quality standards of affected downstream states is not required.

The lower court's absolute ban on new discharges to waterways not currently meeting applicable water quality standards is without any proper statutory basis.

For the foregoing reasons, in addition to those set forth in the petitions for writ of *certiorari*, *amici curiae* Champion International Corporation, American Paper Institute, National Forest Products Association, American Iron and Steel Institute, The Fertilizer Institute, and Arkansas Poultry Federation respectfully urge the Court to grant *certiorari* and reverse the decision of the Court of Appeals.

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March 11, 1991

Supreme Court, U.S.
FILED
MAR 11 1991
OFFICE OF THE CLERK

Nos. 90-1266, 90-1262

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Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE STATES OF COLORADO, NEVADA, NORTH DAKOTA, PENNSYLVANIA AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE STATES OF COLORADO, NEVADA, NORTH DAKOTA, PENNSYLVANIA AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The States of Colorado, Nevada, North Dakota, Pennsylvania and South Dakota submit this brief as *amici curiae* in support of the petitions by the U.S. Environmental Protection Agency ("EPA") and the State of Arkansas, *et al.*, for a writ of certiorari to re-

view the decision of the United States Court of Appeals for the Tenth Circuit in *Oklahoma* v. *EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

INTEREST OF THE AMICI CURIAE

This case presents two issues that are central to the regulation of water quality on interstate waterways. The Amici States have a vital interest in both of these issues because the vast majority of the streams and rivers running through the Amici States are interstate in character. At one point or another, virtually all of the major rivers in these states cross a state boundary. In addition, the streams and lesser rivers feeding these waterways often originate in other states, and in turn, the streams and rivers in the Amici States are tributaries for the rivers of downstream states. Thus, the states submitting this brief have both upstream and downstream concerns about the regulation of their waterways.

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, now serves as the primary source of authority for regulating water quality on these waterways. In conjunction with the provisions of that Act, each state establishes water quality standards for the waters within that state. CWA § 303, 33 U.S.C. § 1313. Any "point source" that intends to discharge effluent into those waters must obtain a permit under the Act's National Pollutant Discharge Elimination System ("NPDES"). CWA § 402, 33 U.S.C. § 1342. One condition for receiving these permits is that the discharge must meet the technology-based effluent limitations set by EPA. CWA § 301, 33 U.S.C. § 1311. Another condition is that the discharge must comply with the water quality standards set by the source state. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

[1] Pursuant to Supreme Court Rule 37.5, this brief is submitted on behalf of the Amici States by their respective Attorneys General and does not require the consent of the parties.

The first issue presented by the Tenth Circuit's decision is whether facilities that discharge into interstate waterways must also comply with the standards set by downstream states, which can vary significantly from the source state's standards. The second issue presented is whether pre-existing violations of any relevant water quality standard, on any downstream segment of an interstate or intrastate waterway, preclude granting new permits. Both of these issues obviously have a critical effect on the ability of countless facilities across the nation to obtain NPDES permits.

Although many states are reluctant to create the appearance of taking sides in litigation between two other states,[2] there is an overriding need for a definitive and nationwide resolution of the issues presented by the Tenth Circuit's decision. The facilities affected by these issues include the wastewater treatment plants owned or operated by nearly every major municipality and by other public agencies, as well as facilities owned by the states themselves. They also include all new industrial facilities locating in these states and existing businesses that are expanding their operations. Indeed, to the extent the Tenth Circuit's decision applies to permit renewals, all publicly and privately owned sources (over 75,000 facilities) would be affected as their NPDES permits come up for renewal during the next five years.

In addition to the impact on publicly owned facilities and future economic growth, this case will affect the regulatory responsibilities of all states that have received permitting authority under the CWA. Nearly forty states now have established programs for issuing NPDES permits to sources within their jurisdiction and have been delegated NPDES permitting authority by EPA. CWA

[2] In addition to the usual considerations of comity, virtually all states are exposed in some manner to interstate controversies regarding their waterways, and taking an official position in other litigation creates yet another risk of inflaming those disputes.

§ 402(b), 33 U.S.C. § 1342(b). Agencies in these states therefore are responsible for reviewing permit applications, identifying the standards which must be met, and analyzing the data to assess compliance with the applicable standards. Moreover, these state agencies must conduct the hearings on contested applications and must assure EPA that they are accounting properly for the standards of neighboring states. To place the magnitude of these programs in perspective, historic data for the nation as a whole suggest that states now managing their own permit programs will process at least 10,000 new and renewal permit applications each year. The issues decided by the Tenth Circuit will affect virtually all aspects of these permitting programs, from the identification of the applicable standards, to the data and hearings required, to the final outcome.

Finally, all states have an extraordinary interest in obtaining a definitive and immediate resolution of these issues *before* the Tenth Circuit's decision causes any further disruption and interstate controversies. The conflict that now exists over the applicability of downstream state standards in the CWA permitting process threatens to disrupt ongoing proceedings and negotiations among the states, as well as to generate new disputes and years of expensive litigation. Moreover, the confusion about the applicable standards and legal effect of pre-existing violations casts intolerable doubt on the ability to obtain permits for projects that are now under construction or in the planning stages. States and municipalities simply cannot afford to have this uncertainty jeopardize the enormous public investment required for building new treatment facilities or discourage private investment that will create new jobs and opportunities.

The Amici States therefore respectfully request this Court to grant certiorari in this case, to resolve the issues presented by the Tenth Circuit's decision and the petitions, and to clarify the law controlling the interstate regulation of water quality under the CWA.

STATEMENT

The Tenth Circuit's decision arose in the context of reviewing a discharge permit issued by EPA to a new municipal sewage treatment plant in Fayetteville, Arkansas. Half of the effluent from that facility's proposed split-flow discharge would flow into a river that crosses into the State of Oklahoma forty miles downstream from the point of discharge. EPA approved the proposed permit based on a finding that the effluent discharged by the facility would fully comply with the federally-approved water quality standards of Arkansas and would have no adverse impact on the water quality of Oklahoma. In overturning EPA's approval of the proposed discharge, the court based its decision on two key legal holdings.

First, the Tenth Circuit held that the Clean Water Act requires an upstream facility to comply with the water quality standards of a downstream state, in addition to the standards of the source state. 908 F.2d at 615. Moreover, under the court's view, the permitting agency (here EPA) is afforded no flexibility in interpreting or applying the water quality standards of a downstream state when considering a permit application. As a result of this approach, the Tenth Circuit specifically rejected EPA's exception that would have allowed the issuance of permits for upstream sources that will have no detectable impact on the water quality of a downstream state. *Id.* at 632 n.53.

Second, the court concluded that an existing violation of a water quality standard triggers a mandatory ban on new permits for upstream facilities. *Id.* at 616. This permit ban would apply to any new upstream facility that proposed to discharge effluent of the type responsible for a downstream violation, provided that *some* amount of the effluent, even if undetectable, would reach the downstream segment. *Id.* at 632.

Applying these two holdings, the Tenth Circuit found that there was a pre-existing violation of water quality

standards in the Oklahoma portion of the waterway into which the effluent from the Fayetteville facility would eventually flow. Under the court's first holding, the Oklahoma standard that is being violated must be applied strictly to Arkansas sources. Under the second holding, EPA was required to deny a permit to the Fayetteville facility because of the ongoing violation. *Id.* at 634.

REASONS FOR GRANTING THE WRIT

I. ALL STATES NEED CLEAR GUIDANCE REGARDING THE APPLICABILITY OF DOWNSTREAM STATE WATER QUALITY STANDARDS IN NPDES PERMITTING DECISIONS.

The issue of whether a downstream state's water quality standards apply to out-of-state sources is critical to the administration of the CWA and the efficient resolution and avoidance of interstate water quality disputes. Prior to the Tenth Circuit's decision, permitting agencies normally based permit approvals on a facility's compliance with the water quality standards of the *source* state. This approach was consistent with a series of decisions by this Court and lower courts regarding the applicability of downstream state standards. The Tenth Circuit's decision now to require a contrary approach creates intolerable confusion and the risk of inconsistent outcomes in different regions of the country. Thus, plenary review is necessary to resolve the conflict over this important issue.

In particular, a series of decisions by this Court have supported development of the current approach by giving primary importance to the laws and standards of the source state. *See, e.g., City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490 (1987). The consistent theme of these decisions is that only the source state, and not a downstream state, can regulate point sources under either its common law or water quality standards adopted pursuant to state statutes and the CWA. For example, this Court

concluded in *Ouellette* that "the CWA precludes a court from applying the law of an affected State against an out-of-state source" and that the CWA preempted application of a downstream state's common law. 479 U.S. at 494.

The decisions of other federal and state courts during the past decade have also contributed to this understanding of the law and of the approach required by the CWA. *See, e.g., Illinois* v. *City of Milwaukee*, 731 F.2d 403, 412-14 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *Tennessee* v. *Champion Int'l Corp.*, 709 S.W.2d 569, 576 (Tenn. 1986), *remanded*, 479 U.S. 1061 (1987).[3] These decisions have all adopted the principle that a source state and EPA have primary regulatory authority over point source discharges. The standards of a downstream state are not directly applicable to an out-of-state source, according to the decisions of these courts.

In addition, Congress reviewed this issue in 1987 and decided against amending the statute to give the standards of downstream states a different role in out-of-state permitting decisions. Specifically, Congress considered amending the Act, in the context of the most recent CWA reauthorization legislation,[4] to *require* EPA to veto a permit that would result in a *substantial* violation of a downstream state's water quality standards.[5] However, Congress ultimatley decided *not* to change the Act in this regard, and instead affirmed the traditional understanding of the law. The sponsors of the bills in both the

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[3] *See also National Wildlife Federation* v. *Federal Energy Regulatory Commission*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990); *Champion International Corp.* v. *EPA*, 652 F. Supp. 1398 (W.D.N.C. 1987), *rev'd on other grounds*, 850 F.2d 182 (4th Cir. 1988).

[4] Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

[5] S. 1128, 99th Cong., 1st Sess. § 117 (1985), *reprinted in* 2 Senate Comm. on Env't & Public Works, 100th Cong., 2d Sess., Legislative History of the Water Quality Act of 1987, at 1546, 1603-05 (1988) [hereinafter Leg. His.].

House and Senate relied heavily on the following language to explain this understanding of the Act's meaning:

> Where two or more states, sharing a common water body, have plans approved by EPA with differing standards of water quality, the Act does provide mechanisms for resolving inter-state conflicts. However, there is nothing in the existing Act or in the proposed amendments which gives EPA the power to force one state to changes [sic] its approved water quality standards or those valid activities done in accordance with its plan in order to accommodate the water quality needs of another state or states.[6]

This interpretation of the Clean Water Act has thus become the underpinning both for state permit programs and for planning by states, municipalities and private industry. Accordingly, new facilities have been constructed and existing facilities retrofitted to meet the water quality standards of the source state. State permitting agencies have focussed their permit programs on ensuring that permit applicants comply with the water quality standards of the source state. Moreover, there has been no need for either state regulators or permit applicants to account for the water quality standards adopted by downstream states, to gather data on conditions in those states, or to conduct modelling and change the design of facilities in light of downstream state standards.

The Tenth Circuit's decision to adopt a contrary interpretation of the CWA, however, creates tremendous uncertainty and could require dramatic changes by states and permit applicants. Unless this Court grants review to settle the conflict that now exists, permitting states will lack clear guidance on the weight they should give to the recommendations of downstream states. Downstream states will be uncertain about their rights to ob-

[6] House Debate on H.R. 1, Jan. 8, 1987, *reprinted in* 1 Leg. His. at 551; Senate Debate on H.R. 1, Jan. 14, 20 & 21, 1987, *reprinted in* 1 Leg. His. at 395.

ject to out-of-state permits. Different states are likely to take different approaches, depending on their own interests and interpretation of the confused tangle of case law, and the uncertainty and inconsistencies that result will exacerbate and provoke even more water quality disputes between states.[7]

Private and public facilities will also face disruptive uncertainties. Existing facilities that were permitted based on compliance with the standards of the source state will have no assurance that the same standards will apply when their permit comes up for renewal. The planning for new facilities will be disrupted even more severly by the uncertainties about applicable standards.

The Tenth Circuit's decision has removed the consensus that previously existed about the applicability of downstream state standards. There is no longer a clear answer to this question that can guide states and permit applicants. The uncertainty and confusion created by the Tenth Circuit's decision and the conflicting interpretations of the CWA must be resolved by this Court.

II. THE TENTH CIRCUIT'S IMPOSITION OF A SWEEPING PERMIT BAN UNDERMINES THE RESPONSIBILITY OF STATES AND THREATENS TO CAUSE WIDESPREAD DISRUPTION.

The Tenth Circuit's second holding requiring a ban on new discharges upstream from a relevant water quality violation also represents a major departure from the current implementation of the CWA. The Tenth Circuit itself admitted that its holding requiring a permit ban

[7] The situation will be further complicated by the 1987 amendment to the CWA that authorizes EPA to treat Indian tribes as states under the Act. CWA § 518(e), 33 U.S.C. § 1377(e). Under the Tenth Circuit's first holding, all discharges upstream from an Indian tribe with approved water quality standards would now be required to comply with those standards. Furthermore, under the Tenth Circuit's second holding, an existing violation of an Indian tribe's standards would require a ban on new upstream permits.

"lacks an explicit imprimatur" in the CWA. 908 F.2d at 633. Nevertheless, based on its own view of the purpose of the CWA, the court imposed a rigid and inflexible permit ban requirement on the states.

As demonstrated by the application of this rule in the instant case, the Tenth Circuit's holding prohibits even new discharges that would have no detectable effect on downstream water quality and therefore would not cause or contribute to any violation of water quality standards. 908 F.2d at 632. The Tenth Circuit's decision would similarly preclude issuance of a permit for a new discharge that was accompanied by an equivalent reduction of loads from other sources. *See id.* at 628 n.48. In these and other circumstances, the Tenth Circuit's decision goes far beyond current practice and would impose substantial new restrictions on a state's ability to issue new permits.

The Amici States are strongly committed to the goals of improving water quality and ameliorating existing violations of water quality standards. However, by imposing a rigid, sweeping permit ban on the states and EPA, the Tenth Circuit has deprived states of all flexibility to reduce water quality violations in the most equitable and least disruptive manner possible. For example, instead of allocating responsibility for reducing pollutant loading fairly among existing and new dischargers, the Tenth Circuit's decision requires states to impose an immediate and absolute ban on new sources upstream from any violation of a relevant water quality standard.

No other court has ever suggested that an existing water quality violation mandates the absolute ban on new permits required by the Tenth Circuit's decision. Thus, the Tenth Circuit's holding appears to be devoid of any legal or precedential support, yet it stands as the only definitive determination to date by a federal court on the significance of existing water quality violations under the CWA.

Compliance with the Tenth Circuit's decision will have drastic consequences for many regions of the country.[8] Unfortunately, a substantial proportion of the nation's waterways currently fail to meet water quality standards,[9] and therefore the Tenth Circuit's decision will require states to deny permits to large numbers of new facilities that propose to discharge effluent upstream from an existing water quality violation. Many new facilities that would have little or no adverse impact on water quality will be unable to obtain discharge permits. Economic and industrial development would likely be stifled in many regions of the nation.

Finally, the Tenth Circuit's decision will impose an impossible administrative burden on permitting agencies and publicly owned facilities in the states. For the first time, agencies and applicants will be required to assess water quality compliance on *all* stream miles and lakes within their borders. This will be an enormous and expensive undertaking, because the monitoring of water quality is a very laborious and resource-intensive activity. According to the most recent EPA statistics, water quality assessments are only available for twenty-nine percent of stream miles and forty-one percent of lake acres in the nation.[10] The states will therefore be required to bear tremendous burdens in assessing water quality on all downstream waterways before issuing new discharge permits.

Given the fundamental importance of the Tenth Circuit's holding, and the extremely difficult position that all

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[8] Any state that fails to comply with the Tenth Circuit's decision may jeopardize its permitting authority and risk substantial delays and controversy in its permitting program as opponents of new permits use the Tenth Circuit's decision to contest permit approvals before the agency and the courts.

[9] EPA, *National Water Quality Inventory, 1988 Report to Congress*, at 1 (EPA 440-4-90-003, April 1990).

[10] *Id.*

states will be placed in by that court's decision, it is imperative that this Court grant certiorari and provide clear guidance on the significance of existing water quality violations under the CWA.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the Tenth Circuit.

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BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE ARKANSAS MUNICIPAL LEAGUE, THE NEW MEXICO MUNICIPAL LEAGUE AND THE NORTH CAROLINA LEAGUE OF MUNICIPALITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1266

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

No. 90-1262

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE ARKANSAS MUNICIPAL LEAGUE, THE NEW MEXICO MUNICIPAL LEAGUE AND THE NORTH CAROLINA LEAGUE OF MUNICIPALITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The Association of Metropolitan Sewerage Agencies, the Arkansas Municipal League, the New Mexico Municipal League and the North Carolina League of Municipalities submit this brief as *amici curiae* in support of the petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in *Oklahoma* v. *EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

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[1] The petitioners and respondents in both cases have consented to the filing of this brief. The letters granting their consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

The amici cities and associations strongly urge this Court to grant certiorari and review the decision of the Tenth Circuit because of the extraordinary impact this decision will have on cities and municipal treatment facilities throughout the country.

The amici associations represent cities and municipal sewerage authorities located all across the nation. In particular, the Association of Metropolitan Sewerage Agencies is a national non-profit association of 116 municipal sewerage agencies and special purpose sewerage districts. Its member agencies are responsible for managing nearly all of the nation's large publicly owned treatment works ("POTWs") serving a combined population of over 80 million people.

The Arkansas Municipal League, the New Mexico Municipal League and the North Carolina League of Municipalities are voluntary associations of municipalities in the respective states that are organized to serve municipal governments and represent their interests before the legislative, executive and judicial branches of the state and federal governments. The Arkansas Municipal League has 479 municipal members, the New Mexico Municipal League is composed of all 99 municipalities in that state, and the North Carolina League of Municipalities has a membership consisting of 496 municipalities. The municipalities in all of these states operate municipal wastewater treatment plants that must discharge effluent into interstate waterways.

Municipalities are directly affected by the Tenth Circuit's decision because they build and operate municipal wastewater treatment plants. Just as every city needs a source of water, so too must every city provide a system for collecting and removing the wastewater used by residents. Municipal treatment plants treat and remove pollutants from the wastewater generated by residential, commercial and industrial buildings in almost

every municipality in the nation. Over time, these treatment plants have become more and more sophisticated and expensive to build, as the nation strives for cleaner water.

Every municipal wastewater treatment plant must apply for and obtain a discharge permit under the National Pollutant Discharge Elimination System ("NPDES") of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. Over 16,000 municipal treatment plants are currently operating with approved NPDES permits. A large number of new and upgraded facilities will be needed by the end of this century to meet the goals of the CWA. New plants are constantly being planned and built, with each new facility typically involving the expenditure of millions of dollars by federal, state and local governments. Total expenditures on new and upgraded municipal treatment plants are expected to exceed $100 billion by the year 2000. Thus, applications for new and renewed permits by municipal treatment plants comprise a substantial portion of the NPDES permitting programs of EPA and the states.

The Tenth Circuit's decision will make it significantly more difficult for municipal treatment plants to receive new or renewed discharge permits under the CWA. The court's decision imposes two new stringent conditions on the approval of NPDES permits for municipal treatment plants and other facilities. First, the court has construed the CWA as requiring facilities to ensure compliance with the water quality standards of downstream states, in addition to the standards of the source state. Second, no new permit can issue to a facility that is upstream from an existing violation of a relevant water quality standard. Since many municipal treatment plants discharge effluent into streams that cross state borders or which flow into interstate waterways, these new requirements for NPDES permits will result in additional restrictions on permits for such facilities. In many cases,

a new municipal treatment plant may be denied a permit outright. For example, the instant case involved the court's denial of a discharge permit issued to the new municipal treatment plant constructed by the City of Fayetteville, Arkansas.

The court's first holding on the interstate application of water quality standards undermines the careful balancing of the interests of upstream and downstream states established by the CWA. Both upstream and downstream states have legitimate interests in the control of water quality on interstate waterways. However, by giving downstream states absolute power to regulate out-of-state sources, the court has adopted a one-sided approach that will frequently produce unfair and unreasonable results. The court's decision will provoke more frequent and more intractable water quality disputes between states, with municipal dischargers often being caught in the middle and denied a discharge permit.

The court's second holding requiring a permit ban upstream from existing violations is an extreme solution to the problem of water quality violations that lacks any legal basis in the CWA. When combined with the court's first holding, the permit ban requirement will cause severe disruption of the CWA's program of building new municipal treatment plants. Federal, state and municipal governments have invested an enormous amount of financial resources in the construction of new municipal treatment plants. Large numbers of new facilities still need to be constructed to meet the water quality goals of the CWA. Many of these new plants are already under construction. and many more are being planned, with total expenditures exceeding several billion dollars per year. The Tenth Circuit's decision will tremendously confuse and disrupt the planning process for these new facilities and will create substantial doubt about whether many of the new facilities can ultimately receive their discharge permits.

Moreover, the court's decision will be counter-productive with respect to improving water quality. The decision will result in the denial of discharge permits to many new municipal wastewater treatment plants. However, these new facilities would have contributed to the improvement of water quality by providing more advanced treatment of wastewater. Thus, by blocking the permit approvals of new municipal dischargers, the Tenth Circuit's decision will end up doing more harm than good to the goal of improving the nation's water quality.

For these reasons, the amici parties representing cities and municipal treatment facilities that will likely be harmed by the Tenth Circuit's decision have a substantial and direct stake in the present case, and respectfully request this Court to grant certiorari.

STATEMENT

This case presents two issues of fundamental importance to the administration of the CWA. In overturning the NPDES permit issued by EPA to the new Fayetteville municipal wastewater treatment plant, the Tenth Circuit imposed two new conditions on the approval of permits under the CWA.[2] Both of the new conditions will dramatically change the requirements for obtaining NPDES permits, and in many cases may result in the denial of a permit altogether.

The first condition imposed by the court is that all discharges must strictly comply with the water quality standards of all downstream states, in addition to the standards of the source state. 908 F.2d at 615. Although the Tenth Circuit could point to no other judicial opinion

[2] The Tenth Circuit overturned the Fayetteville permit based on these two conditions, even though the court did not disturb EPA's findings that the facility's discharge would fully comply with all federally-approved Arkansas water quality standards and in fact would not even have a detectable effect on Arkansas or Oklahoma water quality.

that had required compliance with downstream state standards, the court concluded that the CWA mandated such a requirement. EPA and state permitting agencies were left with no flexibility or discretion to apply or interpret downstream state standards. Since the Fayetteville facility is located approximately forty miles upstream from the Oklahoma border, the court held that the facility's discharge must comply with Oklahoma's federally-approved water quality standards.

The second condition imposed by the Tenth Circuit for approval of an NPDES permit is even more severe. The court required a permitting agency to deny outright any new permit application for a facility situated upstream from an existing violation of a relevant water quality standard. 908 F.2d at 616. In the instant case, the court found that the Oklahoma waterway into which half of the Fayetteville effluent would eventually flow had a preexisting violation of Oklahoma water quality standards. This existing violation could not be attributed to the Fayetteville discharge, since the violation preceded the discharge. The court nevertheless concluded that the statutory scheme required EPA to deny the permit, even though it was unable to find any specific provision in the CWA that supported its new prerequisite for issuing a permit.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION DISRUPTS THE DELICATE BALANCE BETWEEN THE INTERESTS OF UPSTREAM AND DOWNSTREAM STATES AND WILL INCITE INTERSTATE DISPUTES OVER WATER QUALITY.

By requiring point sources to comply strictly with the water quality standards of all downstream states, regardless of how unfair or unreasonable the consequences, the Tenth Circuit's decision gives downstream states unlimited power to regulate out-of-state sources. The adoption of this one-sided approach will disrupt the careful balancing of the interests of upstream and downstream states established by the CWA. Plenary review by this Court is necessary to restore the more balanced approach, which recognizes the legitimate interests of both upstream and downstream states, that was created by Congress for resolving interstate water quality disputes.

A. The Problem Of Interstate Water Pollution Requires An Equitable Approach That Considers The Legitimate Interests Of Both Upstream And Downstream States.

A fair and reasonable approach that considers the legitimate interests of both upstream and downstream states is needed to resolve interstate water quality disputes. As even a quick glance at a map of the United States will attest, most streams in the lower forty-eight states either cross state boundaries or flow into interstate waterways that span two or more states. There is an inherent tension between the geographical fact that waterways are predominantly interstate and the political reality that water quality standards are established on a state-by-state basis under the CWA. CWA § 303, 33 U.S.C. § 1313. When neighboring states adopt inconsistent water quality standards for adjoining segments of the same waterway, full-scale state-versus-state disputes

can erupt in which the legitimate interests of both downstream and upstream states are threatened.

The many important differences in economic, industrial, social, political, and geographical conditions among states inevitably result in different priorities and trade-offs when states establish their water quality standards. A regulatory approach that gives either upstream or downstream states unlimited power to impose their policy choices on adjoining states would result in unjust and unreasonable consequences. For example, if an upstream state were allowed to set its own water quality standards at any level it chose, it could potentially adopt very lax water quality standards in order to create what Congress referred to as a "pollution haven" and attract new industries.[3] While the benefits of lax standards may outweigh the costs to the upstream state, a downstream state would have to tolerate the increased pollution flowing across its borders without obtaining any of the economic benefits that accrue to the upstream state. Thus, giving upstream states unlimited power to adopt their own water quality standards may unfairly pollute the waters of a downstream state.

It would be equally unfair to allow a downstream state to impose unilaterally its policy choices on an upstream state. Yet this is exactly what the Tenth Circuit's decision requires, by forcing dischargers in an upstream state to ensure strict compliance with the water quality standards of a downstream state. A downstream state with very little economic activity on its portion of an interstate waterway could adopt very stringent water quality standards, perhaps even allowing zero discharges, without adversely affecting its own population or economic

[3] *See* S. Rep. No. 370, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 4 Senate Comm. on Environment and Public Works, Legislative History of the Clean Water Act of 1977, at 633, 706 (1978). As described below, Congress deliberately structured the CWA to prevent the establishment of such "pollution havens" by requiring states to comply with minimum federal standards.

prosperity. However, an adjoining upstream state that is more densely populated may suffer severe economic injury if it is required to comply with the downstream state's stringent water quality standards.

Regardless of whether the motivations of the downstream state are innocent or intentionally discriminatory, the effect on upstream states will be equally devastating. New industrial facilities may be denied permits, and many existing facilities may be forced to close. Municipalities in the upstream state may even be denied the right to provide modern sewerage service to their population. The downstream state would have unchecked power to dictate the level of population growth and economic development allowed in an upstream state, without having any incentive or reason to consider the legitimate social and economic interests of the upstream state.

Both of these one-sided approaches give too much weight to the interests of one state while almost completely disregarding the interests of the other. Such approaches would inevitably produce unfair and unreasonable results. Instead, the problem of interstate water pollution needs to be addressed by a more equitable approach that achieves a balance between the legitimate interests of both upstream and downstream states.

B. The Clean Water Act Establishes A Careful Balance Between The Interests Of Upstream And Downstream States.

The provisions of the CWA, as interpreted by courts over the past decade, establish such a balance and protect downstream states from pollutants discharged by upstream sources in at least three ways. First, Congress specifically sought to prevent the establishment of "pollution havens" in upstream states by directing EPA to set national minimum criteria for the state water quality standards required under section 303, 33 U.S.C. § 1313, and the point source effluent limitations required under

section 301, 33 U.S.C. § 1311.[4] State water quality standards must be approved by EPA to ensure that they meet or exceed the federal criteria. CWA § 303(a), 33 U.S.C. § 1313(a).[5] The requirement that all waterways must meet the federally-established minimum criteria for water quality ensures that an upstream state will not be able to adopt inadequate water quality standards that leave the waters of a downstream state unprotected.

Second, the CWA provides a consultative mechanism whereby a downstream state can convey its concerns about upstream discharges to the permitting authority for the source state. If the source state is the permitting authority, it is required to provide an opportunity for a potentially affected downstream state to submit written recommendations with respect to the permit application. CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5). The permitting state is then required to consider the downstream state's recommendations and notify the state if it does not accept the recommendations. *Id.*

Similarly, when EPA is the permitting agency, it must afford a downstream state that may be affected by a proposed discharge an opportunity to present its reasons for opposing the permit at a public hearing. CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2). EPA must consider the downstream state's objections and determine whether additional limitations are necessary to protect

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[4] *See supra* note 3. For example, the federal criteria for water quality are designed to ensure that the designated uses of the waterway are achieved. CWA § 304, 33 U.S.C. § 1314.

[5] If a state's water quality standards are not consistent with EPA's criteria or otherwise defensible, and the state does not make the needed changes in a timely manner, EPA is required by the Act to promulgate adequate standards. Section 303(a), 33 U.S.C. § 1313(a). In addition, section 510, 33 U.S.C. § 1370, allows states to adopt stricter water quality standards that exceed the federal criteria, but these more stringent standards can only be applied against in-state dischargers. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 328 (1981).

downstream water quality. While these provisions do not give a downstream state a veto power over permit decisions in an upstream state, *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490 (1987), they do give the downstream state the right to be consulted and to have the permitting agency consider its views. If the objections of a downstream state are reasonable, there is a strong likelihood that the permitting agency will try to accommodate them in the permitting decision.

Finally, the CWA provides an opportunity for EPA to veto any state-issued permit that fails to adequately protect the water quality of a downstream state. If a state permitting agency declines to adopt the written recommendations of a downstream state to ameliorate the interstate effects of a proposed permit, EPA is given discretion to veto the state-issued permit. CWA § 402(d)(2)(A), 33 U.S.C. § 1342(d)(2(A). EPA's decision whether to veto the permit is discretionary, and federal courts have held that a decision not to veto the permit is unreviewable. *District of Columbia* v. *Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980). Thus, EPA is assigned the role of final arbitrator under the CWA to balance the competing interests of upstream and downstream states, and to block a permit issued by the upstream state that would impose an unreasonable burden on water quality in the downstream state.

C. The Tenth Circuit's Holding Disrupts This Careful Balance Of State Interests And Will Unfairly Allow Downstream States To Impose Their Policy Choices On Upstream States.

The Tenth Circuit's decision completely changes the rules for resolving interstate water quality disputes under the CWA. While other courts have interpreted the CWA to carefully balance the legitimate interests of both upstream and downstream states,[6] the Tenth Circuit's deci-

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[6] *See, e.g., International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981); *Illinois*

sion gives a downstream state absolute power to impose its water quality standards on upstream states, with no mechanism or mediator to prevent unreasonable or unjust results. The unlimited power of a downstream state to adopt water quality standards as strict as it wants under section 510, 33 U.S.C. § 1370,[7] combined with the Tenth Circuit's holding that gives a state the unconditional power to apply such standards extraterritorially against an upstream state, grant downstream states unchecked power to impose their standards on upstream states.

Prior to the Tenth Circuit's decision, downstream states had an advisory, but not a controlling, role in upstream permitting decisions. Thus, downstream states were compelled to negotiate and compromise with upstream states to reach mutually acceptable resolutions of potential interstate disputes over water quality. Under the Tenth Circuit's decision, downstream states will now have the right to block new permits in upstream states by imposing very stringent water quality standards. By giving downstream states absolute power over upstream states on matters of interstate water quality, the decision below eliminates the incentive for downstream states to reach negotiated solutions, and therefore will result in a dramatic increase in contested permit proceedings, litigation and economic warfare between states.[8]

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v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

[7] Courts and EPA have taken the position that the Agency has no power to disapprove state water quality standards that are stricter than the minimum federal criteria. *See, e.g., Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979).

[8] For example, in one state alone, the Tenth Circuit's decision is already being used to challenge the permit applications of the municipal treatment plants in the Arkansas cities of Siloam Springs, Springdale and Rogers. Conflicts over the right to use interstate waterways have unfortunately provoked frequent litigation among states in the past whenever the stakes are this high and no effective mechanism exists for mediating the competing interests of the affected states. *See, e.g., International Paper Co.* v. *Ouellette*, 479

The potential for unjust and unreasonable consequences —not to mention the widespread disruption described in Section II below—is enormous if the court of appeals' decision is allowed to stand. The CWA provides important safeguards to ensure that water quality standards do not impose unreasonable requirements on permit applicants. These safeguards will work as planned if the standard-setting agency has an incentive and a willingness to consider the ramifications of a proposed standard for all affected discharges and for all the affected population. The setting of water quality standards has always involved the balancing of economic and environmental considerations to improve water quality without causing undue economic and social hardship. *See, e.g.*, 48 Fed. Reg. 51,400 (1983). Since a state has a strong stake in the ability of in-state sources to serve and support its residents and to create new jobs, a state agency has an incentive not to set standards that are impossible or economically infeasible for such sources. However, a state has no such incentive to consider the feasibility of the standard for out-of-state sources, because there is no commonality of social and economic interests.

As one example of this potential for unreasonable consequences, the statutory scheme now permits states to revise their own water quality standards if attainment is not feasible because the standards "would result in substantial and widespread economic and social impact." 40 C.F.R. § 131.10(g)(6). However, a downstream state with a stringent water quality standard is unlikely to give adequate consideration to the economic or environmental impact of its standards on an upstream state, and therefore is unlikely to make accommodations when setting its standards, even when it would be appropriate to do so.

U.S. 481 (1987) (water quality); *Colorado* v. *New Mexico*, 459 U.S. 176 (1982) (water quantity); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (water quality); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945) (water quantity); *New York* v. *New Jersey*, 256 U.S. 296 (1921) (water quality); *Kansas* v. *Colorado*, 206 U.S. 46 (1907) (water quantity).

Similarly, a state can grant variances from its own water quality standards to individual facilities that cannot meet a standard.[9] Again, a downstream state has very little incentive to consider the circumstances of an out-of-state facility and grant a variance when appropriate. Thus, the provisions built into the CWA to prevent the unreasonable application of water quality standards will not function properly to protect sources in upstream states if they are required to comply with downstream state standards.

In fact, the Tenth Circuit's decision will even enable downstream states to discriminate against out-of-state facilities and to otherwise block vital projects in upstream states. For example, a state could declare a segment of a waterway just inside its border to be an outstanding national resource water and apply very strict water quality standards that effectively foreclose any new economic development or population growth in upstream states along the waterway. At the same time, the state could adopt much less stringent standards for downstream segments that would allow unrestricted economic development within the downstream state. *See, e.g., City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (an example of one state discriminating against another with respect to pollution disposal).

Regardless of whether downstream states would themselves act unfairly, private parties, interest groups, business competitors and Indian tribes could all use the decision below in a comparable manner. This will become an increasingly difficult problem as more and more Indian tribes are recognized as "states" by EPA under the CWA and allowed to adopt their own water quality standards. CWA § 518, 33 U.S.C. § 1377. The proliferation of authorities that can set water quality standards that apply to a particular facility will create a complicated web of inconsistent regulations, which will make compliance by

[9] *See* EPA, *Water Quality Standards Handbook* (Dec. 1983).

individual sources extremely difficult and would hinder, if not preclude, the issuance of many new permits.

It is therefore imperative for this Court to grant certiorari before the Tenth Circuit's decision creates any further disruption in the issuance of new permits and provokes additional interstate disputes and litigation.

II. THE TENTH CIRCUIT'S IMPOSITION OF A PERMIT BAN UPSTREAM FROM EXISTING WATER QUALITY VIOLATIONS WILL CAUSE SEVERE DISRUPTION AND WILL ACTUALLY IMPAIR EFFORTS TO IMPROVE WATER QUALITY.

The Tenth Circuit's novel construction of the CWA to require a ban on new permits upstream from existing water quality violations will have unacceptable and unnecessary adverse economic and environmental consequences. Even though the Tenth Circuit itself conceded that its holding lacked an explicit basis in the CWA,[10] the court nevertheless proceeded to impose unilaterally a drastic new regulatory requirement on permitting agencies and permit applicants. Thus, plenary review by this Court is also needed to clarify the significance of existing water quality violations under the CWA and to prevent the widespread harm that will result from this aspect of the Tenth Circuit's decision.

The Tenth Circuit's permit ban holding was based on the court's determination that "common sense" required a ban on new permits in order to meet the goals of the CWA.[11] However, instead of imposing an absolute ban on new sources on waterways that are not currently attaining water quality standards, the CWA envisions

[10] 908 F.2d at 633 (the court's holding requiring a permit ban "'lacks an *explicit* imprimatur' in the CWA").

[11] 908 F.2d at 631 ("Common sense dictates that a pollution control strategy designed to prevent, abate, and eliminate pollution would be subverted by allowing a new source of pollution on a currently polluted watercou[illegible]

a more equitable and less disruptive approach. States are required to allocate among all existing and new dischargers the total maximum daily load that a particular waterway can accept without exceeeding standards. CWA § 303(d), 33 U.S.C. § 1313(d). These maximum daily load allocations are to be completed in phases, based on the priority ranking the state assigns to each waterway within its borders. This more reasonable approach gives states the flexibility and time to achieve water quality standards without having to adopt a permit ban that will freeze economic growth and industrial development.

The permit ban required by the Tenth Circuit's decision, especially when extended to out-of-state upstream sources as a result of the court's first holding, threatens to disrupt one of the principal goals of the Clean Water Act—the construction of publicly-owned wastewater treatment plants. CWA § 101(a)(4), 33 U.S.C. § 1251(a)(4). An enormous amount of public funds and long-term planning have been dedicated to the construction of these plants. By now creating major impediments to the ability of many of these plants to obtain NPDES permits, the Tenth Circuit's decision will wreak intolerable havoc for municipalities and permitting agencies.

EPA has estimated that it will cost some $108 billion by the year 2000 to construct the new municipal wastewater treatment plants that are needed to meet the requirements of the CWA.[12] Over 6000 new plants will have to be built, and over 5000 existing plants will have to be enlarged or upgraded.[13] Each facility will cost millions of dollars on average, and will take eight to ten years to construct.[14] The planning or construction for many of these new facilities is already well underway.

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[12] *Amending the Clean Water Act: Hearings on S. 53 and S. 652 Before the Subcomm. on Environmental Pollution of the Senate Environment and Public Works Comm.*, 99th Cong., 1st Sess. 309 (1985).

[13] *Id.* at 299.

[14] *Id.* at 300.

The design, specifications, and location of these new municipal facilities have been carefully selected to, among other things, ensure compliance with state water quality standards. The Tenth Circuit's decision may now impose significant new requirements on these facilities in order to ensure compliance with downstream water quality standards. Newly constructed facilities may be required to undertake major and expensive design changes or changes in the proposed method of discharge. Even worse, many of the facilities now being planned or constructed may be denied a permit altogether under the Tenth Circuit's decision if they happen to be located upstream from an existing water quality violation. These new facilities will have no control or certainty over whether they will eventually be issued a permit, since their fate will now be determined by the activities of downstream dischargers in any downstream state.

In addition, the Tenth Circuit's decision will create administrative disruptions and burdens in the permit process. The court's new requirements for permit approvals will increase the already substantial backlog of permit applications and permit renewals. As of 1985, there was a nationwide backlog of over 25,000 permit renewals.[15] By further increasing this permit backlog, the Tenth Circuit's decision will create additional uncertainty and delays for the approval of municipal treatment plant permits.

Furthermore, permit applicants will now be required to demonstrate that there are no pre-existing water quality violations downstream from their proposed discharge. Municipalities will therefore be required to spend scarce resources gathering the additional data on downstream water quality that will be required to accompany permit applications. Finally, the increased risk of litigation that will be created by the extreme and unreasonable consequences of the court's holdings will further burden mu-

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[15] *Id.* at 437.

nicipalities. The Tenth Circuit's decision will therefore cause major disruptions in the planning and permitting procedures of many new municipal treatment facilities, and will result in staggering economic and social disasters for those municipalities that are denied a permit altogether for their newly constructed facilities.

Moreover, the Tenth Circuit's supposed "solution" to water quality violations will be counter-productive and will in many cases worsen rather than improve water quality. In particular, denying permits to new municipal wastewater treatment plants upstream from existing violations will not improve water quality; it will likely make it worse. Municipal wastewater treatment plants do not themselves generate pollution; instead they remove pollutants from wastewater generated by other sources. Accordingly, prohibiting permits for new municipal wastewater plants hinders rather than helps the improvement of water quality. For example, a recent study by EPA found that the construction or upgrading of municipal treatment plants generally resulted in substantial improvements of downstream water quality.[16] The Tenth Circuit's holding is therefore not only legally indefensible as shown by the certiorari petitions, but it is extremely short-sighted on the very policy grounds the Tenth Circuit used to justify its decision.[17]

Plenary review by this Court is urgently needed to prevent the severe and unreasonable consequences that will result from the Tenth Circuit's decision.

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[16] EPA, *Before-and-After Case Studies: Comparisons of Water Quality Following Municipal Treatment Plant Improvements* (EPA-430/9-007, May 1984).

[17] The new $40 million, state-of-the-art municipal treatment plant built by the City of Fayetteville is a case in point. The facility has been denied a permit by the Tenth Circuit, even though it will result in a marked improvement in environmental quality compared to the old treatment facility it was intended to replace.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the Tenth Circuit.

Respectfully submitted,

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March 11, 1991

(9) (9)

Nos. 90-1262, 90-1266

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

IN THE

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On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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JOINT APPENDIX

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Dated: May 31, 1991

PETITIONS FOR CERTIORARI FILED FEBRUARY 8, 1991
CERTIORARI GRANTED APRIL 1, 1991

89-56

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-9503

STATE OF OKLAHOMA;
OKLAHOMA SCENIC RIVERS COMMISSION;
POLLUTION CONTROL COORDINATING BOARD,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

OKLAHOMA WILDLIFE FEDERATION; STATE OF ARKANSAS; ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY; CITY OF FAYETTEVILLE, Arkansas; THE BEAVER WATER DISTRICT,
Intervenors.

No. 89-9507

SAVE THE ILLINOIS RIVER (STIR), a non-profit corporation of the State of Oklahoma,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

BEAVER WATER DISTRICT; STATE OF ARKANSAS; ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY; CITY OF FAYETTEVILLE, Arkansas; STATE OF OKLAHOMA; OKLAHOMA SCENIC RIVERS COMMISSION; POLLUTION CONTROL COORDINATING BOARD,
Intervenors.

No. 89-9516

STATE OF ARKANSAS; ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY; THE BEAVER WATER DISTRICT; CITY OF FAYETTEVILLE,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

SAVE THE ILLINOIS RIVER (STIR); STATE OF OKLAHOMA; OKLAHOMA SCENIC RIVERS COMMISSION; POLLUTION CONTROL COORDINATING BOARD,

Intervenors.

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1/12/89	Petition for review filed for State of Oklahoma.
1/24/89	Notice of intervention as party filed by Oklahoma Wildlife Federation in No. 89-9503.
1/30/89	Petition for review filed for Save the Illinois.
2/8/89	Notice of intervention as party filed by City of Fayetteville in No. 89-9503.
2/8/89	Notice of intervention as party filed by the Beaver Water District in No. 89-9503.
2/8/89	Notice of intervention as party filed by State of Arkansas in 89-9503, Arkansas Department of Pollution Control & Ecology in No. 89-9503.
2/9/89	Letter from Clear Creek and Illinois River Property Owners Association of Arkansas expressing their opinions in the appeal.

DATE	FILINGS—PROCEEDINGS
2/14/89	Notice of intervention as party filed by the Beaver Water District in No. 89-9507.
2/14/89	Notice of intervention as party filed by State of Arkansas and Arkansas Department of Pollution Controls & Ecology in No. 89-9507.
2/16/89	Notice of intervention as party filed by City of Fayetteville in No. 89-9507.
3/3/89	Respondent's motion to consolidate appeals filed by EPA in Nos. 89-9503 and 89-9507.
3/10/89	Case docketed. Transfer from Eight Circuit of Petition for Review filed by City of Fayetteville, The Beaver Water District, Arkansas Department, and State of Arkansas.
3/10/89	Notice of intervention as party filed by Save the Illinois in 89-9516.
3/24/89	Motion filed by Petitioner State of Oklahoma in No. 89-9503 to consolidate appeals, and to extend time to file petitioner's brief until 40 days from which the motion to consolidate is granted.
3/28/89	Response filed by Save the Illinois in Nos. 89-9507 and 89-9516 to motions to consolidate appeals in Nos. 89-9503, 89-9507, 89-9516.
3/29/89	Notice of intervention as party filed by State of Oklahoma in Nos. 89-9507 and 89-9516.
3/31/89	Intervenor's brief filed by Oklahoma Wildlife in No. 89-9503. The Oklahoma Wildlife Federation adopts in full and incorporates by reference the Brief in Chief of State of Oklahoma, Oklahoma Dept. of Pollution Control & Oklahoma Scenic Rivers Commission.

DATE	FILINGS—PROCEEDINGS
4/4/89	Response filed by City of Fayetteville in No. 89-9516, The Beaver Water District in No. 89-9516, Arkansas Department in No. 89-9516, State of Arkansas in No. 89-9516 to motions to consolidate appeals in Nos. 89-9507, 89-9503, 89-9516.
4/6/89	Respondent's motion to dismiss case along with memorandum in support filed by EPA.
4/6/89	Respondent's motion to consolidate appeals and briefing schedules and to stay briefing pending resolution of jurisdictional issues.
4/10/89	Order filed by RLH granting Respondent's motion to consolidate appeals, granting Petitioners' motion to consolidate appeals, and granting Petitioners' motions to extend time to file opening briefs.
4/17/89	Order filed by RLH deferring Respondent's motion to dismiss case to the panel assigned to hear the case on the merits.
4/21/89	Response filed by State of Oklahoma in No. 89-9516 to Appellee/Respondent motion to dismiss case and Appellee/Respondent motion to consolidate appeals.
4/24/89	Response filed by Save the Illinois in No. 89-9516 to Respondent motion to dismiss case.
5/2/89	Response filed by Arkansas Department in No. 89-9503, State of Arkansas in No. 89-9503, The Beaver Water District in No. 89-9503, City of Fayetteville in No. 89-9503, City of Fayetteville in No. 89-9507, Arkansas Department in No. 89-9507, State of Arkansas in No. 89-9507, The Beaver Water District in No. 89-9507, City of Fayetteville in No. 89-9516, The Beaver Water District in No. 89-9516, Arkansas Department in No. 89-9516, State of Arkansas in No. 89-9516.

DATE	FILINGS—PROCEEDINGS
5/3/89	Response filed by Arkansas Department in 89-9503, State of Arkansas in 89-9503, The Beaver Water in 89-9503, City of Fayetteville in 89-9503, City of Fayetteville in 89-9507, Arkansas Department in 89-9507, State of Arkansas in 89-9507, The Beaver Water District in 89-9507, EPA in 89-9516, The Beaver Water District in 89-9516, Arkansas Department in 89-9516, State of Arkansas in 89-9516 to Respondent motion to dismiss case in 89-9516.
5/22/89	Petitioner's brief filed by State of Oklahoma in 89-9503, Save the Illinois in 89-9507.
5/22/89	Addendum to brief filed by Petitioner State of Oklahoma in 89-9503, Intervenor State of Oklahoma in 89-9507, Petitioner Save the Illinois in 89-9507, Intervenor State of Oklahoma in 89-9516, Intervenor Save the Illinois in 89-9516.
6/28/89	Brief filed by Petitioner City of Fayetteville in 89-9516, Petitioner The Beaver Water District in 89-9516, Petitioner Arkansas Department in 89-9516, Petitioner State of Arkansas in 89-9516.
6/28/89	Addendum to brief filed by Petitioner City of Fayetteville in 89-9516, Petitioner The Beaver Water District in 89-9516, Petitioner Arkansas Department in 89-9516, Petitioner State of Arkansas in 89-9516.
8/11/89	Respondent's brief filed by EPA in Nos. 89-9503, 89-9507, and 89-9516.
8/11/89	Addendum to brief filed by Respondent EPA in Nos. 89-9503, 89-9507, and 89-9516.
8/25/89	Agency record filed. Volumes I-XI (ORIGINALS).
9/11/89	Petitioner's reply brief filed by State of Oklahoma in 89-9503, Save the Illinois in 89-9507, City of Fayetteville in 89-9516, The Beaver Water District in 89-9516, Arkansas Department in 89-9516, State of Arkansas in 89-9516.

DATE	FILINGS—PROCEEDINGS
9/11/89	Addendum to brief filed by Petitioner State of Oklahoma in 89-9503, Petitioner Save the Illinois in 89-9507, Petitioner City of Fayetteville in 89-9516, Petitioner The Beaver Water District in 89-9516, Petitioner Arkansas Department in 89-9516, Petitioner State of Arkansas in 89-9516.
9/27/89	Petitioner's reply brief filed by State of Oklahoma in 89-9503, Save the Illinois in 89-9507, City of Fayetteville in 89-9516, The Beaver Water District in 89-9516, Arkansas Department in 89-9516, State of Arkansas in 89-9516.
1/5/90	Hearing set for March 1990 Session, at Denver.
2/8/90	Petitioner's settlement conference report filed.
2/23/90	Motion to enlarge the time for oral argument filed by State of Arkansas in 89-9503, EPA in 89-9503, State of Oklahoma in 89-9503, State of Oklahoma in 89-9507, State of Arkansas in 89-9507, EPA in 89-9507, State of Oklahoma in 89-9516, EPA in 89-9516, State of Arkansas in 89-9516.
2/27/90	Order filed by Judge(s) Anderson, Brorby, Theis granting motion to enlarge time for argument.
3/5/90	Case argued and submitted to Judges Anderson, Brorby, Theis.
7/11/90	Terminated on the Merits after Oral Hearing; Petition has been review and we REVERSE EPA's decision authorizing Fayetteville's municipal treatment plant to discharge a portion of its effluent to the Illinois River basin. Written, Signed, Published. Anderson, panel member; Brorby, authoring judge and Theis, panel member.
8/20/90	Respondent's motion to extend time to file petition for rehearing until 9/10/90 filed by EPA in Nos. 89-9503, 89-9507, and 89-9516.

DATE	FILINGS—PROCEEDINGS
8/21/90	Order filed by RLH granting Respondent motion to extend time to file petition for rehearing.
8/22/90	Motion to extend time to file petition for rehearing until 9/10/90. Filed by Arkansas Department, State of Arkansas, The Beaver Water District, City of Fayetteville in Nos. 89-9503,, 89-9507, 89-9516.
9/6/90	Order filed by Judges Anderson, Brorby and Theis granting motion to extend time to file petition for rehearing. Petition for rehearing may be filed on or before 9/10/90.
9/10/90	Motion for leave to leave to file brief of amicus curiae filed by Arkansas Poultry in 89-9503, 89-9507, 89-9516.
9/10/90	Joint motion for leave to file amici brief filed by Associated Indust. and Arkansas Federation in 89-9503, 89-9507 and 89-9516.
9/10/90	Motion for leave to file amicus curiae brief filed by Arkansas Municipal in 89-9503, 89-9507 and 89-9516.
9/10/90	Petition for rehearing en banc filed by EPA in 89-9503, 89-9507 and 89-9516.
9/10/90	Petitions for rehearing en banc filed by Arkansas Department in 89-9503, 89-9507, and 89-9516.
9/10/90	Petition for rehearing en banc filed by City of Fayetteville in 89-9503, 89-9507, and 89-9516.
9/10/90	Petition for rehearing en banc filed by State of Arkansas in 89-9503, 89-9507, and 89-9516.
9/10/90	Petition for rehearing en banc filed by The Beaver Water District in 89-9503, 89-9507, 89-9516.
10/11/90	Amendment to opinion filed by Judge(s) Anderson, Brorby, Theis.

DATE	FILINGS—PROCEEDINGS
10/11/90	Order filed by Judge(s) Anderson, Brorby, Theis granting motions of Arkansas Poultry Federation, Associated Industries of Arkansas, and Arkansas Federation of Air & Water Users leave to become amicus in 89-9503, 89-9507, 89-9516.
10/11/90	Order filed by Judge(s) Holloway, McKay, Logan, Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, Theis denying Petitions for rehearing en banc.
10/16/90	Motion to stay execution of the mandate until 1/11/91 pending filing of a petition for writ of certiorari filed by Arkansas Department State of Arkansas, The Beaver Water District and City of Fayetteville in 89-9503, 89-9507, and 89-9516.
10/19/90	Response filed by EPA in 89-9503, 89-9507, and 89-9516 to motion to stay execution of the mandate pending a petition for writ of certiorari.
10/23/90	Response filed by Save the Illinois in 89-9507, Save the Illinois in 89-9516 motion to stay execution of the mandate in 89-9503, 89-9507, 89-9516.
10/23/90	Response filed by State of Oklahoma in 89-9503, State of Oklahoma in 89-9507, State of Oklahoma in 89-9516 motion to stay execution of the mandate until in 89-9503, 89-9507, 89-9516.
10/24/90	Reply filed by State of Arkansas in 89-9503, Arkansas Department in 89-9507, State of Arkansas in 89-9507, Arkansas Federation in 89-9507, Arkansas Municipal in 89-9507, State of Arkansas in 89-9516, Arkansas Poultry in 89-9516, Arkansas Federation in 89-9516, Arkansas Municipal in 89-9516 to motion to stay execution of the mandate until in 89-9503, 89-9507, 89-9516.

DATE	FILINGS—PROCEEDINGS
10/31/90	Order filed by Judges Anderson, Brorby and Theis granting motion to stay execution of the mandate until 1/10/91 pending filing of petition for certiorari, if cert is filed mandate is stayed pending disposition in Supreme Court in 89-9503, 89-9507, 89-9516.
10/31/90	Amended Affidavit of Shon Simpson filed by Petitioner State of Oklahoma in 89-9503. Intervenor State of Oklahoma in 89-9507 and 89-9516.
2/15/91	Petition for writ of certiorari filed on 2/8/91 by Intervenor State of Arkansas in 89-9503, Intervenor State of Arkansas in 89-9507, Petitioner State of Arkansas in 89-9516. Supreme Court Number 90-1262.
2/19/91	Petition for writ of certiorari filed on 2/8/91 by Respondent EPA in 89-9503, Respondent EPA in 89-9507, Respondent EPA in 89-9516. Supreme Court Number 90-1266.

ENVIRONMENTAL PROTECTION AGENCY

RELEVANT DOCKET ENTRIES

A. AGENCY ORDERS AND FINDINGS

Index #	Entry Date	Document and Originator
A-1	01-10-86	Letter (partial grant of evidentiary hearing request) (RA)
A-2	05-07-86	Notice of Designation (AJO)
A-3	05-30-86	Order (denying review) (AJO)
A-4	05-30-86	Correction to Order Denying Review (AJO)
A-6	06-16-86	Designation of ALJ (Chief ALJ)
A-8	08-21-86	Order (admitting parties) and Request for Briefs (ALJ)
A-9	09-22-86	Order (*in limine*) (ALJ)
A-11	11-17-86	Order (scheduling) (ALJ)
A-17	05-18-87	Order on Motions (summary determination and dismiss) (ALJ)
A-20	07-31-87	Order (administration of hearing) (ALJ)
A-22	08-12-87	Order (excluding testimony of Dr. Meyer; allowing supplemental testimony of FAY) (ALJ)
A-23	09-01-87	Order (post-hearing briefing schedule) (ALJ)
A-26	01-20-88	Initial Decision (ALJ)
A-28	06-30-88	Order on Petitions for Review (ALJ)
A-29	07-11-88	Order (briefing) and Motion (for time extension) (ALJ)
A-32	09-13-88	Order Denying Motions for Reconsideration (A)

Index #	Entry Date	Document and Originator
A-33	09-22-82	Decision on Remand (ALJ)
A-34	10-20-88	Letter (suspending *sua sponte* review limit) (AJO)
A-35	10-28-88	Order on Motion (denying reconsideration) (ALJ)
A-37	11-28-88	Second Order on Petitions for Review (denying petitions) (AJO)

B. ADMINISTRATIVE PLEADINGS

B-1	12-06-85	Request for Evidentiary Hearing (STIR)
B-2	12-10-85	Request for Evidentiary Hearing (OK)
B-3	12-12-85	Supplemental Request for Evidentiary Hearing (STIR)
B-4	02-12-86	Notice of Appeal (of Partial Denial of Hearing) (STIR)
B-5	02-14-86	Notice of Appeal and Petition for Review (OK)
B-7	02-20-86	Letter to R. McCallum re: OK Notice of Appeal (EPA)
B-8	02-26-86	Response to STIR Notice of Appeal (EPA)
B-9	03-06-86	Response to OK Petition for Review (EPA)
B-10	03-31-86	Tranmittal of Record to AJO (EPA)
B-13	07-25-86	Response to ALJ request for Record Supplement (EPA)
B-22	08-29-86	EPA Response to Order of 8-18-86 (OK WQS status) (EPA)
B-23	09-04-86	Brief (Land Application) (OK)
B-24	09-11-86	Reply Brief (Land Application) (EPA)

Index #	Entry Date	Document and Originator
B-25	09-17-86	Joint Reply Brief (Land Application) (ARK & FAY)
B-26	09-26-86	Ltr. (EPA to ALJ) re: Party Availability for pre-hearing conference (EPA)
B-30	01-06-87	Production of Documents (FAY)
B-31	01-06-87	Production of Documents (OK)
B-32	01-08-87	Prefiled Testimony (Cliff Thompson) (FAY)
B-33	01-09-87	Prefiled Testimony (Robert Blanz) (ARK)
B-34	01-09-87	Prefiled Testimony (Silvester Leonard, Garret Bondy, Larry Champagne, Ancil Jones) (EPA)
B-35	01-12-87	Prefiled Testimony (Jimmy Pigg, Mike Schornick, William Walker, Jr.) (OK)
B-36	01-12-87	Production of Documents (FAY)
B-37	01-12-87	Motion for Admission of Evidence (Arkansas River Compact Commission Order) and Prefiled Testimony (Stephen Threlkeld) (OWF)
B-38	01-15-87	Supplemental Prefiled Testimony (Water Quality Survey) (OK)
B-40	01-30-87	Index to Permit Record (EPA)
B-44	02-10-87	Response to OK Request for Production (FAY)
B-46	02-13-87	Prefiled Rebuttal Testimony (Cliff Thompson) (FAY)
B-48	02-17-87	Production of Documents (ARK)
B-50	02-19-87	Response to Request for Production of Documents and Information (EPA)

Index #	Entry Date	Document and Originator
B-52	02-20-87	Amended Response to Request for Production (ARK)
B-53	02-23-87	Transmittal Letter for Prefiled Rebuttal Testimony (OK)
B-54	02-23-87	Prefiled Rebuttal Testimony (Lawrence Edmison, William Walker, Jr., Mike Schornick) (OK)
B-55	02-23-87	Amendment to Prefiled Testimony (William Walker, Jr.) (OK)
B-56	02-25-87	Prefiled Rebuttal Testimony (Jack Gakstatter) (EPA)
B-57	02-25-87	Letter to EPA (IRPA)
B-58	02-25-87	Letter to ALJ (IRPA)
B-59	02-26-87	Prefiled Rebuttal Testimony (Martin Maner) (ARK)
B-60	03-02-87	Production of Documents (OK)
B-64	04-02-87	Request for Hearing Date (OK)
B-65	04-03-87	Motion for Summary Determination (EPA)
B-66	04-07-87	Motion to Dismiss (ARK)
B-67	04-07-87	Brief in Support of Motion to Dismiss (ARK)
B-68	04-10-87	Responsee to Request for Hearing Date (ARK)
B-70	04-10-87	Response to Request for Production of Documents and Information (ARK)
B-71	04-20-87	Objection to Motion to Dismiss (OWF)
B-72	04-20-87	Brief in Support of Objection (OWF)
B-73	04-21-87	Response to Motion to Dismiss (OK)
B-74	04-21-87	Brief in Support of Response (OK)

Index #	Entry Date	Document and Originator
B-75	04-22-87	Response to Request for Hearing Date (EPA)
B-76	04-23-87	Objection to Motion to Dismiss (STIR)
B-77	04-23-87	Objection to Motion for Summary Determination (STIR)
B-78	04-23-87	Brief in Support of Objections (STIR)
B-79	04-30-87	Response to Request for Hearing Date (FAY)
B-80	05-04-87	Response to Request for Hearing Date (BWD)
B-81	05-06-87	Response to Objection to Motion to Dismiss (EPA)
B-82	05-08-87	Response to Motion for Summary Determination (OK)
B-83	05-08-87	Brief in Support of Response (OK)
B-84	05-12-87	Response to Motion for Summary Determination (OWF)
B-85	05-12-87	Brief in Support of Response (OWF)
B-86	05-12-87	Response to Request for Hearing Date (OWF)
B-87	05-20-87	Response to Request for Hearing Date (STIR)
B-88	05-22-87	Notice of Substitution of Witness (Lee Bohme for Silvester Leonard) (EPA)
B-89	05-22-87	Request for Substitution of Witness (David Neleigh for Myron Knudson) (EPA)
B-90	06-01-87	Notice of Unavailability of Witness and Motion for Leave to Prefile Testimony (Robert Blanz) (ARK)

Index #	Entry Date	Document and Originator
B-91	06-08-87	Response to Witness Substitution Request and Notice of Unavailability (OK)
B-94	07-14-87	Production of Documents (BWD)
B-95	07-14-87	Motion for Leave to Supplement Prefiled Testimony (Luanne Diffin) (FAY)
B-96	07-20-87	Motion for Leave to Supplement Prefiled Testimony (Richard Meyers) (BWD)
B-97	07-27-87	Response to Request for Hearing Date (BWD)
B-99	08-06-87	Prefiled Testimony (Richard Meyers) (BWD)
B-100	08-07-87	Objection to Motion for Leave to Supplement Testimony (OK)
B-101	08-11-87	Objection to Motion for Leave to Supplement Testimony (STIR)
B-102	08-17-87	Response to Objections to Motion for Leave to Supplement Testimony (BWD)
B-103	08-28-87	Supplement to Hearing Record (EPA)
B-104	09-23-87	Supplement to Hearing Record (OK)
B-108	11-09-87	Proposed Findings of Fact and Conclusions of Law (OWF)
B-109	11-10-87	Proposed Findings of Fact and Conclusions of Law (FAY)
B-110	11-13-87	Proposed Findings of Fact and Conclusions of Law (BWD)
B-111	11-13-87	Proposed Findings of Fact and Conclusions of Law (EPA)
B-112	11-16-87	Proposed Findings of Fact and Conclusions of Law (ARK)

Index #	Entry Date	Document and Originator
B-113	11-16-87	Proposed Findings of Fact and Conclusions of Law (STIR)
B-114	11-17-87	Proposed Findings of Fact and Conclusions of Law (OK)
B-115	12-07-87	Reply Brief (FAY)
B-116	12-07-87	Reply Brief (STIR)
B-117	12-11-87	Reply Brief (ARK)
B-118	12-14-87	Reply Brief (EPA)
B-119	12-16-87	Reply Brief (OK)
B-120	12-17-87	Reply Brief (BWD)
B-121	12-18-87	Reply Brief (OWF)
B-122	———	Motion for Reconsideration (STIR)
B-123	02-12-88	Response to Motion for Reconsideration (FAY)
B-124	02-12-88	Response to Motion for Reconsideration (ARK)
B-126	02-19-88	Notice of Appeal (STIR)
B-127	02-22-88	Notice of Appeal and Petition for Review (OK)
B-128	02-22-88	Notice of Appeal and Petition for Review (OWF)
B-129	03-02-88	Response to Notice of Appeal and Petition for Review (EPA)
B-131	03-08-88	Response to Notice of Appeal and Petition for Review (BWD)
B-132	03-09-88	Response to Notice of Appeal and Petition for Review (ARK, FAY & BWD)
B-133	03-10-88	Response to Notice of Appeal and Petition for Review (EPA)

Index #	Entry Date	Document and Originator
B-134	03-10-88	Response to Notice of Appeal and Petition for Review (FAY)
B-135	03-14-88	Response to Notice of Appeal and Petition for Review (ARK)
B-136	03-29-88	Correction to Notice of Appeal and Petition for Review (OK)
B-137	07-20-88	Brief in Response to Order on Remand (STIR)
B-138	07-27-88	Motion for Extension of Time to File (Briefs (FAY & BWD)
B-139	08-02-88	Motion for Reconsideration (FAY)
B-140	08-02-88	Brief in Support of Motion for Reconsideration (FAY)
B-141	08-08-88	Correction to Brief in Support of Motion for Reconsideration (FAY)
B-142	08-10-88	Brief in Response to Order on Remand (FAY)
B-143	08-10-88	Brief in Response to Order on Remand (EPA)
B-144	08-11-88	Joint Supplemental Brief in Response to Order on Remand (ARK, FAY & BWD)
B-145	08-11-88	Second Motion for Reconsideration (STIR)
B-146	08-12-88	Brief in Response to Order on Remand (OK)
B-147	08-15-88	Brief in Response to Order on Remand (OWF)
B-148	08-18-88	Response to Second Motion for Reconsideration (OK)

Index #	Entry Date	Document and Originator
B-149	08-18-88	Response to Second Motion for Reconsideration (FAY)
B-150	08-18-88	Response to Motion for Reconsideration (STIR)
B-151	08-19-88	Objection to Motion for Reconsideration (OWF)
B-152	08-29-88	Response to Motion for Reconsideration (OK)
B-153	09-07-88	Correction to Response (OK)
B-154	09-29-88	Motion for Reconsideration (EPA)
B-155	10-25-88	Notice of Appeal & Petition for Review (BWD)
B-156	10-25-88	Notice of Appeal & Petition for Review (STIR)
B-157	10-25-88	Notice of Appeal & Petition for Review (OWF)
B-158	10-26-88	Notice of Appeal (EPA)
B-159	10-26-88	Notice of Appeal & Petition for Review (OK)
B-161	11-17-88	Joint Response to [EPA] Notice of Appeal (ARK, FAY & BWD)
B-162	11-17-88	Brief in Support of Joint Response to [OK] Notices of Appeals (ARK, FAY & BWD)
B-163	11-17-88	Joint Response to [EPA] Notice of Appeal (ARK, FAY & BWD)
B-164	11-17-88	Brief in Support of Joint Response to [EPA] Notice of Appeal (ARK, FAY & BWD)

C. PROCEEDINGS

Index #	Entered	Document
C-1	08-18-87 08-19-87 08-20-87	Transcript of Proceedings Transcript of Proceedings Transcript of Proceedings
EPA-1	08-18-87	Direct Testimony of Silvester C. Leonard
EPA-2	08-18-87	Direct Testimony of Garrett E. Bondy
EPA-3	08-18-87	Direct Testimony of Larry Champagne
EPA-4	08-18-87	Rebuttal Testimony of Jack H. Gakstatter
EPA-5	08-18-87	Letter dated May 29, 1986, from Lawrence Edmison to Myron O. Knudson
EPA-6	08-28-87	Letter from Myron Knudson approving 1985 Oklahoma Water Quality Standards (Supplement to Record)
ARK-1	08-19-87	Rebuttal Testimony of Martin Maner
ARK-2	08-19-87	T. Phos. Data at Talequah (Computer printout)
ARK-3	08-19-87	Wasteload Evaluation Report
ARK-4	08-19-87	Direct Testimony of Robert E. Blanz
ARK-5	08-20-87	Excerpts from "Water Quality Assessment of the Illinois River Basin, Arkansas"
ARK-6	08-20-87	Administrative Record of Hearing before the Arkansas-Oklahoma River Compact Commission
BWD-1	———	Testimony of Dr. Richard L. Meyer (Proffer Only—Rejected by Order of ALJ)
BWD-2	———	Rejected—No Proffer (Black & Veatch Study)

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BWD-3	08-20-87	U.S.G.S. Topographic Map Copan, Okla-Kans. Quadrangle
BWD-4	08-20-87	1974 NPDES Permit 0K0020168 (Copan, Ok.)
BWD-5	08-20-87	1986 NPDES Permit 0K0020168 (Copan, Ok.)
FAY-1	08-19-87	Industrial Pretreatment Code for the City of Fayetteville, Arkansas
FAY-2	08-19-87	Direct Testimony of Dr. Cliff Thompson
FAY-3	98-19-87	Rebuttal Testimony of Dr. Cliff Thompson
FAY-4	08-20-87	Letter dated 1/25/84, from Mark S. Coleman to Mr. Philip B. Lorenz
FAY-5	08-20-87	Memorandum dated August 7, 1986, From Mr. Quang Phan to Mr. Larry Edmison
OK-1	08-18-87	Direct Testimony of Jimmy Pigg
OK-2	08-19-87	Direct Testimony of Mike Schornick
OK-3	08-19-87	Rebuttal Testimony of Mike Schornick
OK-4	08-20-87	Direct Testimony of Lawrence R. Edmison
OK-5	08-20-87	Rebuttal Testimony of Lawrence R. Edmison
OK-6	08-20-87	Oklahoma's Water Quality Standards 1985
OK-6A	08-20-87	Oklahoma's Water Quality Standards 1982
OK-7	08-20-87	*Curriculum Vitae* of William W. Walker, Jr.
OK-8	08-20-87	Direct Testimony of William W. Walker, Jr.

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OK-9	08-20-87	Amendment to Direct Testimony of William W. Walker, Jr.
OK-10	08-20-87	Rebuttal Testimony of William W. Walker, Jr.
OK-11	08-20-87	28 Photographs (supplement to record)
OWF-1	08-19-87	Order of the Arkansas River Compact Commission
OWF-2	08-19-87	Direct Testimony of Dr. Stephen Threlkeld

OKLAHOMA'S

WATER QUALITY STANDARDS

1982

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SECTION 1

INTRODUCTION

In the development of water resources in the last century, the quality of water developed has often been of minor consequence. During recent years, however, an increase in population has resulted in community, industrial and agricultural development, and has caused the scientific and engineering communities to reassess the role of water quality and elevate it to a position of comparable importance with water quantity.

The Oklahoma Water Resources Board's statutory authority and responsibility concerning water pollution and its remedies is expressly provided for under 82 O.S. 1981, §§ 926.1 through 926.13. Under these statutes the Oklahoma Water Resources Board is required to set water quality standards which are practical and in the best public interest and to classify the State's waters with respect to their best present and future uses. These standards are designed to enhance the quality of the waters, to protect their beneficial uses, and to aid in the prevention, control and abatement of water pollution in the State of Oklahoma. Title 82 O.S. 1981, § 926.6(A) provides that these standards and classifications may be modified or revised from time to time. Under Public Law 92-500, Section 303(c)(1) as amended by PL 95-217, the Governor or the State water pollution control agency is required to hold public hearings at least once each three year period for the purpose of reviewing, and as appropriate, modifying and adopting standards.

The Standards specify numerical and narrative criteria for specific streams. This is accomplished by determining which beneficial uses are designated in Appendix A. Then the numerical and narrative criteria designed to protect each beneficial use for the stream must be reviewed in Section 4. The criteria that apply are the most stringent of those reviewed for each parameter.

Since these criteria will protect the most sensitive use assigned, they will protect all designated uses.

The purpose of the Standards is to promote and protect as many beneficial uses as are attainable and to assure that degradation of existing quality of waters of the State does not occur. This is accomplished by incorporating the Standards into the permitting and management process for all dischargers, and using the Standards to determine when a beneficial use is threatened. When standards are exceeded, currently available treatment technologies for point sources and such best management practices as are applicable for nonpoint source pollution should be implemented.

SECTION 2

ADOPTION AND ENFORCEABILITY OF THE STANDARDS

The 1982 Oklahoma Water Quality Standards as encompassed in Section 3 through 9 and Appendices A, B, C and D, are adopted as Rules and Regulations by the Oklahoma Water Resources Board pursuant to the Oklahoma Administrative Procedures Act 75 O.S. 1981, § 301 et. seq. and are fully enforceable under the laws of Oklahoma. These standards shall apply to all waters of the State, as defined in 82 O.S. 1981, § 926.1(6).

SECTION 3

ANTI-DEGRADATION POLICY

The intent of the Anti-degradation Policy is to protect all waters of the State from quality degradation. Existing instream water uses shall be maintained and protected. No further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed. Oklahoma's waters constitute a valuable State resource and shall be protected, maintained and improved for the benefit of all the citizens.

It is recognized that certain waters of the State possess an existing water quality which exceeds those levels necessary to support propagation of fish, shellfish, wildlife, and recreation in and on the water. These high quality waters shall be maintained and protected unless the State decides, after full satisfaction of the intergovernmental coordination, and public participation provisions of the State's continuing planning process, to allow lower water quality as a result of necessary and justifiable economic or social development. Furthermore, where limited degradation is justified, the State shall require that any new point source of pollution or increased load from an existing point source, protect all existing and attainable beneficial uses through the highest statutory and regulatory requirements, and feasible management or regulatory programs pursuant to Section 208 of Public Law 92-500 as amended by PL 95-217 for nonpoint sources.

No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in National and State parks, Wildlife Refuges, and those designated "Scenic Rivers" in Appendix A.

As the quality of Oklahoma waters improves, no degradation of such improved waters shall be allowed. When the yearly mean standard for a specific parameter decreases to the point where the goals listed in Appendix E become attainable, degradation will be prohibited by incorporating the goal as a standard.

In those cases where potential water quality impairment associated with a thermal discharge is involved, the anti-degradation policy and implementation method shall be consistent with Section 316 of Public Law 92-500 as amended by PL 95-217.

SECTION 4

STANDARDS FOR WATER QUALITY

Title 82 O.S. 1981, § 926.2, provides as follows:

> "Whereas the pollution of the waters of this state constitute a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas the problem of water pollution of this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for propagation of wildlife, fish and aquatic life and for domestic, industrial, recreational, and other legitimate beneficial uses; to provide that no waste be discharged into any waters of the state without first being given the degree of treatment necessary to protect the legitimate beneficial uses of such waters; to provide for the prevention, abatement and control of new or existing water pollution. . ."

Beneficial uses are designated for all of Oklahoma's waters and are protected through the restrictions imposed by the narrative and numerical standards. Some uses require higher quality water than others. When multiple uses are assigned to the same waters, all such uses shall be protected. Beneficial uses will also be protected by permits issued in accordance with requirements of current water quality standards and through practical management or regulatory programs for nonpoint sources. The present beneficial uses designated by these standards to certain waters of the state are:

Section 4.1 Public and Private Water Supplies
Section 4.2 Emergency Public and Private Water Supplies
Section 4.3 Fish and Wildlife Propagation
Section 4.4 Agriculture
Section 4.5 Hydroelectric Power Generation
Section 4.6 Industrial and Municipal Process and Cooling Water
Section 4.7 Primary Body Contact Recreation
Section 4.8 Secondary Body Contact Recreation
Section 4.9 Navigation
Section 4.10 Aesthetics
Section 4.11 Smallmouth Bass Fisheries (Excluding Lake Waters)
Section 4.12 Trout Fisheries (Put and Take)

The numerical standards for perennial streams shall be maintained any time the flow equals or exceeds the seven-day, two-year low flow value. In intermittent streams, the numerical standards shall be maintained when the ambient stream flow is at or greater than 1.0 cfs. Furthermore, at such time as numerical limits do not apply, instream conditions, including dissolved oxygen concentration shall be maintained to prevent nuisance conditions caused by man's activities. Narrative standards [Section 4.3(d), 4.3(h)(1), 4.4, 4.10(c), 4.10(d), and 4.10(e)] shall be maintained at all times and apply to all perennial and intermittent streams. The narrative and numerical standard assigned to a stream is the most stringent required to protect all the beneficial uses designated for that stream.

The control measures for other substances not mentioned in these standards will be based on applicable

Federal and State statutes, rules and regulations and accumulated scientific data on limits above which injury from use occurs. Such control measures when adopted pursuant to 75 O.S. 1981, § 301 et seq. will become a part of these standards.

4.1 PUBLIC AND PRIVATE WATER SUPPLIES

The quality of the waters of the State shall be protected, maintained and improved, when feasible, so that they can be used as a source of public and private raw water supplies.

Drinking water standards dictate the quality of water that should be achieved in a municipal water distribution system without reference to desirable raw water quality. Although it is possible to renovate highly polluted surface waters to these standards, the process required would be both complex and expensive. Raw water quality criteria have been developed to aid in the selection of water sources so that the water supply chosen can, by commonly proven applied treatment processes, achieve the drinking water standards, all within reasonable economic limits.

4.1(a) TOXIC LIMITS

The waters of the State shall be maintained so they will not be toxic to humans. With specific reference to streams and lakes designated as Public and Private Water Supplies, the following numerical limits of contaminants shall not be exceeded.

RAW WATER NUMERICAL LIMITS

PARAMETERS	NUMERICAL LIMIT (mg/L)
Inorganic Elements:	
Arsenic	.10
Barium	1.0
Cadmium	.02
Chromium	0.05
Copper	1.0
Cyanide	0.2
Fluoride (at 90°F)	1.6
Lead	.10
Mercury	0.002
Nitrates (as N)	10.0
Selenium	0.01
Silver	0.05
Zinc	5.0
Organic Chemicals:	
Benzidine	0.001
Detergents (total)	0.2
Methylene blue active substances	0.5
Phthalate esters	0.003
2,4-D	0.1
2,4,5-TP Silvex	0.01
Endrin	0.0002
Lindane	0.004
Methoxychlor	0.1
Toxaphene	0.005

4.1(b) PESTICIDES

Pesticides shall not be present in such concentrations as to cause the waters of the State to be toxic or carcinogenic to human, animal, plant or aquatic life.

The application of 2,4,5-T for currently approved uses (rangeland and rice), in the proper manner at the approved application rate may result in instream

concentrations in excess of 0.01 mg/L. Therefore, temporary excursions not to exceed 0.1 mg/L will be allowed in the event unforeseen rainfall events occur within 24-hours after application.

4.1(c) RADIOACTIVE MATERIALS

There shall be no discharge of radioactive materials in excess of the limits found in Oklahoma Radiation Protection Regulations, 1969, or its latest revision.

The concentration of gross alpha shall not exceed the specified limit or the naturally occurring concentration, whichever is higher.

The combined dissolved concentration of Radium-226 and Radium-228, and Strontium-90, shall not exceed 5 picocuries/liter, and 8 picocuries/liter, respectively. Gross alpha particle concentrations, including Radium-226 but excluding radon and uranium, shall not exceed 15 picocuries/liter. The gross beta concentration shall not exceed 50 picocuries/liter. The average annual concentration of beta particle and photon radioactivity from man-made radionuclides in drinking water shall not produce an annual dose equivalent to the total body or any internal organ greater than 4 millirem/year.

4.1(d) COLIFORM

The bacteria of the fecal coliform group shall not exceed a monthly geometric mean of 200/100 ml at a point of intake for a public or private water supply. The geometric mean will be determined by multiple tube fermentation or membrane filter procedures based on a minimum of not less than five (5) samples taken over not more than a thirty (30) day period. Further, in no more than 10% of the total samples during any thirty (30) day period shall the bacteria of the fecal coliform group exceed 400/100 ml.

4.1(e) OIL AND GREASE (PETROLEUM AND NON-PETROLEUM RELATED)

For public and Private Water Supplies, the water shall be maintained free from oil and grease and taste and odors that emanate from petroleum products.

4.2 EMERGENCY PUBLIC AND PRIVATE WATER SUPPLIES

During emergencies, those waters designated Emergency Public and Private Water Supplies may be put to use. Each emergency will be handled on a case by case basis, and be thoroughly evaluated by the appropriate State agencies and/or local health authorities.

4.3 FISH AND WILDLIFE PROPAGATION

There are no generalized water quality standards aplicable for all kinds of fish and wildlife. Generally, unpolluted waters support a more diverse aquatic community while only tolerant species can survive in comparatively polluted waters. In addition, waters of diverse habitat will exhibit more species than waters with limited habitat variation. The impact of a given chemical or physical constitutent on a biological community is not mutually exclusive of other constituents since synergistic interactions are common. The following Narrative and Numerical Standards are designated to promote fish and wildlife propagation.

4.3(a) DISSOLVED OXYGEN

Two dissolved oxygen (DO) standards are designed to protect the diverse warm water fisheries of Oklahoma. Streams designated as Primary Warm Water Fisheries are required at all times to meet a minimum dissolved oxygen of 5.0 mg/L. Streams designated as Secondary Warm Water Fisheries are required at all times to meet a minimum dissolved oxygen of 3.0 mg/L.

Allowable loadings designed to attain these criteria shall be calculated at the low flow value and critical temperature as defined in Appendix C.

4.3(b) TEMPERATURE

At no time shall heat be added to any stream in excess of the amount that will raise the temperature of the receiving water more than 5°F. In streams, temperature determinations shall be made by averaging representative temperature measurements of the cross sectional area of streams at the end of the mixing zone.

In lakes, the temperature of the water column and/or epilimnion, if thermal stratification exists, shall not be raised more than 3°F above that which existed before the addition of heat of artificial origin, based upon the average of temperatures taken from the surface to the bottom or surface to the bottom of the epilimnion, if stratified.

The normal daily and seasonal variations that were present before the addition of heat from other than natural sources shall be maintained. The maximum temperature due to man-made causes shall not exceed 90°F in warm water streams and lakes except in the segment of Arkansas River from Red Rock Creek to the headwaters of Keystone Reservoir where maximum temperature shall not exceed 94°F.

No artificial heat shall be added such that the receiving water temperature exceeds the maximums specified above.

Privately owned lakes and reservoirs used in the process of cooling water for industrial purposes, are not classified as waters of the State, (See Appendix C) and are exempt from these temperature restrictions, provided the water released from any such lake or reservoir into a stream system shall meet the water quality standards of the receiving stream.

4.3(c) pH (HYDROGEN ION ACTIVITY)

The pH values shall be between 6.5 and 9.0 for Oklahoma's water; unless pH values outside that range are due to natural conditions.

4.3(d) OIL AND GREASE (PETROLEUM AND NON-PETROLEUM RELATED

All waters of the State shall be maintained free of oil and grease to prevent a visible film of oil or globules of oil or grease on or in the water. Oil and grease shall not be present in quantities that adhere to stream banks and coat bottoms of water courses or which cause deleterious effects to the biota.

4.3(e) POLYCHLORINATED BIPHENYLS (PCBs)

Although PCBs may occur in low concentrations in the water column, these toxic chemicals may accumulate in bottom sediments and tissues of aquatic organisms. Therefore, sediment and tissue analyses should routinely be used to complement water analyses. The instream concentration of PCBs shall not exceed 0.3 micrograms per liter for the waters of the state. When water concentrations are less than 0.3 micrograms per liter, a fish tissue level in excess of 2.0 milligrams per kilogram shall be cause for concern and further investigation.

4.3(f) PESTICIDES

Pesticides shall not be present in such concentrations as to cause the waters of the State to be toxic or carcenogenic to human, animal, plant or aquatic life. The instream concentrations of pesticides shall not exceed the numerical limits provided for the waters of the State.

PESTICIDE STANDARDS IN THE WATER COLUMN FOR THE PROTECTION OF FISH AND WILDLIFE PROPAGATION

PARAMETERS	NUMERICAL LIMIT (μg/L)
Aldrin/Dieldrin	1.0
Chlordane	20.0
DDT	0.2
Endosulfan	0.2
Endrin	0.2
Heptachlor	0.5
Lindane	2.0
Toxaphene	1.0
2,4,5-TP Silvex	10.0

Although pesticides can occur in low concentrations in the water column, they may accumulate in bottom sediments and tissues of aquatic organisms. Therefore, sediment and tissue analyses should routinely be used to complement water analyses. Fish tissue levels in excess of the following alert levels shall be cause for concern and further investigation.

PESTICIDE ALERT LEVELS IN FISH TISSUE

PARAMETERS	ALERT LEVELS (mg/kg)
Alrin/Dieldrin	0.3
Chlordane	0.3
DDT	5.0
Endrin	0.3
Heptachlor	0.3
Toxaphene	5.0

4.3(g) DIVERSITY OF BENTHIC MACROINVERTEBRATES

The decrease in diversity of benthic macroinvertebrates between an upstream and downstream station, (or downstream before and after discharge from a pollution source) shall not exceed one (1), unless caused by natural conditions or phenomena. The de-

termination of this parameter shall be made in conjunction with the Similarity Index.

The equation used for determining species diversity ($\bar{d}$) is expressed:

$$\bar{d} = \sum_{i=1}^{s} (n_i/n) \log_2 (n_i/n)$$

Where (s) equals the total number of taxa in the sample; (n_i) equals the number of individuals per taxon; and (n) equals the total number of individuals of all taxa.

For point sources, a minimum set of six(6) samples must be collected above the discharge point and six (6) samples at the end of the mixing zone; or, if upstream sampling is not applicable, then sampling must be made at the end of the mixing zone (Section 7) before and after commencement of discharge. Samples should be collected from a variety of substrate types if available, but similar substrates must be sampled above and below the discharge. Values of diversity shall not be based on less than one hundred (100) individuals per sample.

Benthos shall be collected with a Surber sampler, Ekman dredge, or comparable sampler. In streams where grab samples do not accurately reflect the benthic assemblage, the artificial substrate sampler shall be used. Artificial substrate samplers shall be of the Hester-Dendy or basket type. A minimum instream duration of six (6) weeks shall be allowed for colonization of artificial substrate samplers.

Where multiple discharges are in close proximity on the stream segment and overlapping of mixing zones occurs, diversity values may be used only in support of other data collected to determine compliance with these standards.

4.3(h) TOXIC SUBSTANCES

(1) The waters of the State shall be maintained so that they will not be toxic to fish and other terrestrial and aquatic life. Toxic substances in waters of the State shall not be present in quantities which allow significant bioaccumulation and/or biomagnification in the food chain.

(2) Selection of appropriate concentration limits will insure the continued propagation of fish and wildlife in and around Oklahoma's streams. Aside from the aesthetic qualities of fish and wildlife, it should be realized that the health of these populations of organisms can act as an index which reflects overall environmental welfare and potential health of neighboring human populations.

Assigning concentration limits for the Fish and Wildlife Propagation beneficial use is very complex. Limits are generally assigned based upon laboratory bioassay work designed to determine the 96-hour LC_{50} for a particular aquatic species. There are several physical, chemical and biological problems which arise when attempts are made to develop water quality standards based upon single maximum concentration values. For this reason numerical concentration limits are developed in this section for specified toxics. For toxics not specified, or where data is not available in the following table, concentrations for nonpersistent toxic substances shall not exceed 0.1 of the 96-hour LC_{50} for sensitive indigenous species. Concentrations of persistent toxicants shall not exceed 0.05 of the 96-hour LC_{50}, for sensitive indigenous species. Concentrations of bioaccumulative toxicants shall not exceed 0.01 of the 96-hour LC_{50} for sensitive indigenous species. Bioassay

data for *Pimephales promelas* (Fathead minnow) and/or *Lepomis macrochirus* (Bluegill) shall be used in determining compliance with the above standards.

There are several other criteria besides LC_{50} data by which standards to protect fish and wildlife propagation may be obtained. The laboratory detection limit must be considered. The EPA and Water Quality Management Plan recommended values must be considered. A methodology incorporating all of these criteria was used to produce the segment specific standards presented below which are measured as the total recoverable metals in the water column.

[Table with specific values omitted in printing
Joint Appendix]

4.4 AGRICULTURE (LIVESTOCK AND IRRIGATION)

Proper water quality is essential for irrigation of crops and livestock consumption. The waters of the State shall be maintained so that toxicity does not inhibit continued ingestion by livestock or irrigation of crops. Excessive concentrations of minerals in irrigation water result in damage to crops and produce undesirable soil conditions. High salinity water should be used with best management practices as outlined in "Diagnosis and Reclamation of Saline Soils," United States Department of Agriculture Handbook #60, 1958.

The intake of highly mineralized water by animals can cause physiological disturbances of varying degrees. Lactation and reproduction are disturbed by continuous use of water of unfavorable mineral composition. In some cases, particular ions within total salinity such as nitrate, fluoride, selenium sales and molybdenum may be harmful to livestock.

Sufficient supplies of good quality water have always been critically important in all forms of agricultural

enterprise. Because of the vast number of agricultural uses made of water, this beneficial use is assigned to all Oklahoma streams. It is recognized, however, that many streams are less suitable for irrigation purposes than others. The classification set forth herein is intended only as a guide in allocating this beneficial use, not in limiting the allowable levels for a stream.

Class	Suitability	Salt Conc. (mg/L)
I	suitable under almost all conditions	under 700
II	suitably dependent on crop, soil, climate, etc.	700-2,100
III	unsuitable under most conditions	over 2,100

* Estimated as equivalent to total dissolved solids.

These guidelines are applied to the irrigation beneficial use designation for the yearly mean standard of the dissolved solid concentration in Oklahoma streams. The resulting beneficial use designations are displayed in Appendix A.

For the watering of livestock the limits of tolerance vary depending on the species of animal, kind of salt present, climate, etc. "Safe upper limits" vary from 2,860 mg/L for poultry to 15,600 mg/L for sheep. For temporary use, sheep can tolerate up to 18,600 mg/L. Therefore, no absolute limitation for this beneficial use is appropriate.

For chlorides, sulfates and total dissolved solids, the arithmetic mean of the concentration of the samples taken for a year in a particular segment shall not exceed the historical "yearly mean standard" (see Appendices B and C) generated in that segment. Furthermore, not more than one (1) in twenty (20) samples randomly collected shall exceed the historical value of the "sample standard" generated in that segment. Increased mineralization from other elements such as calcium, magnesium, sodium and their associated anions,

etc., shall be maintained at or below a level that will not restrict any beneficial use.

Historical data are available, only for sparsely distributed sampling stations. Therefore, the data in each segment are averaged, and mean chloride, sulfate, and TDS are presented in Appendix B. It is anticipated that as sources of pollution are identified and adequately addressed, the mineral concentrations may decrease over a period of time. Due to the limited data base it can only be assumed that water within a segment is homogeneous. As more data becomes available, subsegments may be delineated if they differ from the remainder of the segment. In assigning permit limitations based on water quality standards for total dissolved solids, sulfates or chlorides interpolation between monitoring stations will be acceptable where appropriate.

4.5 HYDROELECTRIC POWER GENERATION

This beneficial use is not generally dependent upon water quality.

4.6 INDUSTRIAL AND MUNICIPAL PROCESS AND COOLING WATER

Quality criteria for water used for process or cooling purposes vary with the type of industrial or municipal processes involved. This use will be protected by application of the criteria for other beneficial uses.

4.7 PRIMARY BODY CONTACT RECREATION

Primary Body Contact Recreation involves direct body contact with the water where a possibility of ingestion exists. In these cases the water shall not contain chemical, physical or biological substances in concentrations that are irritating to skin or sense organs or are toxic or cause illness upon ingestion by human beings.

4.7(a) COLIFORM

In waters designed for Primary Body Contact Recreation the following limit for fecal coliform bacteria shall apply only during the recreation period of May 1 to October 1. The standards for Secondary Body Contact Recreation will apply during the remainder of the year.

The bacteria of the fecal coliform group shall not exceed a monthly geometric means of 200/100 ml, as determined by multiple tube fermentation or membrane filter procedures based on a minimum of not less than five (5) samples taken over not more than a thirty (30) day period. Further, in no more than 10% of the total samples during any thirty (30) day period shall the bacteria of the fecal coliform group exceed 400/100 ml.

4.8 SECONDARY BODY CONTACT RECREATION

The water quality requirements for Secondary Body Contact Recreation are usually not as stringent as for Primary Body Contact Recreation. Secondary body contact recreational activities include boating, fishing, wading or other activities where ingestion of water is not anticipated. Waters shall be maintained to be free from human pathogens in numbers which may produce adverse health effects.

4.9 NAVIGATION

This beneficial use is generally more dependent on water quantity than water quality.

4.10 AESTHETICS

To be aesthetically enjoyable, the waters of the State must be free from floating materials and suspended substances that produce objectionable color and turbidity. The waters must be free from noxious odors and tastes,

and from materials that settle to form objectionable deposits, and discharges that produce undesirable or nuisance aquatic life.

4.10(a) COLOR

Waters of the State shall be virtually free from all coloring materials which produce an aesthetically unpleasant appearance. Color producing substances, from other than natural sources, shall be limited to concentrations equivalent to 70 color units (CU).

4.10(b) TURBIDITY

Turbidity from other than natural sources shall be restricted to not exceed the following numerical limits:

1. Warm Water Streams .. 50 Nephelometric Turbidity Units
2. Warm Water Lakes .... 25 Nephelometric Turbidity Units
3. Cold Water Streams .... 10 Nephelometric Turbidity Units

(Those designated as smallmouth bass fisheries or trout fisheries)

In waters where background turbidity exceeds these values, turbidity from point sources shall be restricted to not exceed ambient levels. Unless due to purely natural or non-man induced conditions the turbidity levels may reasonably be expected to decrease as management of man induced nonpoint sources occur.

These numbers apply to normal stream flow conditions with turbidity levels up to seven days after a high flow event to be decided on a case by case basis.

4.10(c) NUTRIENTS

The total phosphorous concentration and the nitrogen/phosphorous concentration ratio shall not be increased to levels which result in man induced eutrophication problems.

4.10(d) SOLIDS (SUSPENDED AND/OR SETTLEABLE)

The waters of the State shall be maintained so as to be essentially free of floating debris, bottom deposits, scum, foam and other materials, including suspended substances of a persistent nature, from other than a natural source.

4.10(e) TASTE AND ODOR

Taste and odor producing substances from other than natural origin shall be limited to concentrations that will not interfere with the production of a potable water supply by modern treatment methods or produce abnormal flavors, colors, tastes and odors in fish flesh or other edible wildlife or result in offensive odors in the vicinity of the water, or otherwise interfere with beneficial uses.

4.11 SMALLMOUTH BASS FISHERIES (EXCLUDING LAKE WATERS)

Water which will support smallmouth bass fisheries is characterized by a lower temperature and higher dissolved oxygen concentration. The presence of smallmouth bass generally indicates clean water conditions. Numerical standards shall be maintained at all times in smallmouth bass fisheries.

4.11(a) DISSOLVED OXYGEN

The dissolved oxygen concentration shall not be less than 6.0 mg/L for those waters designated as smallmouth bass fisheries.

It is recognized that diurnal fluctuations of dissolved oxygen occur in natural aquatic systems due to primary production and respiration processes. Due to natural fluctuations, a 1.0 mg/L dissolved oxygen concentration deficit shall be allowed for not more than eight (8) hours during any twenty-four (24) hour period.

4.11(b) TEMPERATURE

The normal daily and seasonal variations that were present before the addition of heat from other than natural sources shall be maintained. The maximum temperature due to man-made causes shall not exceed 84°F in smallmouth bass streams.

4.12 TROUT FISHERIES (PUT AND TAKE)

The maintenance of trout fisheries (put and take) generally requires cool and high quality waters. A higher dissolved oxygen concentration is required for this beneficial use than for warm water fisheries. Numerical standards shall be maintained at all times in trout fisheries.

4.12(a) DISSOLVED OXYGEN

The dissolved oxygen concentration shall not be less than 6.0 mg/L for those waters designated as trout fisheries. Due to natural fluctuations, a 1.0 mg/L dissolved oxygen concentration deficit shall be allowed for not more than eight (8) hours during any twenty-four (24) hour period.

4.12(b) TEMPERATURE

The normal daily and seasonal variations that were present before the addition of heat from other than natural sources shall be maintained. The maximum temperature due to man-made causes shall not exceed 68°F in trout streams.

SECTION 5

BENEFICIAL USE LIMITATIONS

All streams and bodies of water designated as (a) are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3.

All streams designated by the State as "scenic river areas," and such tributaries of those streams as may be appropriate will be so designated. Best management practices for control of nonpoint source discharge should be initiated when feasible.

SECTION 6

BENEFICIAL USE DESIGNATIONS FOR GROUNDWATER

Waters are classified according to the uses for which they are suited. Waters of the State include both surface and groundwater. Existing groundwater beneficial uses shall be protected from degradation. The maximum total dissolved solids concentration which shall be allowed is 5,000 mg/L. Where multiple uses are assigned to a groundwater basin (see definition: Groundwater Basin) all such uses shall be protected. At this time data is available and uses have been assigned to the twenty-one major basins shown in Appendix F. The data base for groundwater quality and quantity is insufficient to assign beneficial uses to Oklahoma's minor groundwater basins. It is anticipated that more data will be collected and compiled in the near future. At that time groundwater use classifications for the remaining basins will be added.

The following beneficial use classifications are assigned to Oklahoma's major basins as shown in Appendix F.

CLASSIFICATIONS

1. Irrigation
2. Municipal and Domestic
3. Industrial
4. Recreation
5. Commercial
6. Fish and Wildlife

6.1 IRRIGATION

These are groundwaters suitable for irrigation of crops usually grown in Oklahoma. Highly mineralized groundwaters can damage crops and cause undesirable soil conditions. High salinity groundwaters should only be used in accordance with Best Management Practices such as those outlined in "Diagnosis and Reclamation of Saline Soils," U.S. Department of Agriculture Handbook, #60, 1958.

6.2 MUNICIPAL AND DOMESTIC

These waters are suitable for potable water supplies and include waters used for housing development and multiple-unit domestic use. Class I waters are uncontaminated and Class II waters require disinfection. There may be waters which do not fit into either the Class I or Class II classifications but which may be suitable for domestic water supply use after special treatment.

(a) Class I—Uncontaminated Groundwaters:

These are groundwaters which receive a high degree of natural protection and meet, without treatment, all Oklahoma drinking water regulations.

(b) Class II—Waters Requiring Disinfection:

These are groundwaters which, after receiving approved disinfection such as simple chlorination or its equivalent will meet Oklahoma drinking water regulations.

6.3 INDUSTRIAL

Industrial use is the use of groundwater in processes designed to convert materials of a lower order of value into forms having greater useability and commercial value, including water necessary for the development of electric power and drilling of oil and gas wells.

Quality criteria for water used for cooling purposes vary with the type of industrial processes involved. This use will be protected by application of the Water Quality Standards.

6.4 RECREATION

These are groundwaters pumped to the surface to use for swimming, fishing, hunting, or other forms of water recreation.

6.5 COMMERCIAL

Commercial use includes but is not limited to water for laundries, cafes, motels, institutions, rural water districts, feed yards, food processing, and sale of groundwater by a permit holder.

6.6 FISH AND WILDLIFE

Includes groundwater pumped to the surface to be used for propagation of fish and wildlife.

SECTION 7

MIXING ZONES AND ZONES OF PASSAGE

7.1 MIXING ZONES

When a liquid of different quality than the receiving water is discharged to an aquatic system, a mixing zone is formed. The concept of mixing zone is recognized as a necessary element of Oklahoma's Water Quality Standards. In the case of perennial streams, the mixing zone extends downstream a distance equivalent to thirteen (13) times the width of the water at the point of effluent discharge. The concentration of toxic substances in a mixing zone shall not exceed the 96-hour LC_{50} for sensitive indigenous species. Mixing zones in lakes and intermittent streams shall be designated on a case by case basis. It is recognized that the water quality

in the mixing zone may be unsuitable for certain beneficial uses. Where overlapping mixing zones due to multiple outfalls occur, the total length of the mixing zone will extend thirteen stream widths from the downstream discharge.

7.2 ZONES OF PASSAGE

All discharges shall be regulated to insure that at the outfall and throughout the mixing zone, a zone of passage shall be maintained within the stream that shall be no less than seventy-five percent (75%) of the cross-sectional area or flow volume, whichever is more beneficial to the free-swimming and drifting organisms. Water quality standards shall be maintained throughout the zone of passage. Zones of passage in lakes and intermittent streams shall be designated on a case by case basis.

SECTION 8

TESTING PROCEDURES

All methods of sample collection, preservation, and analysis used in applying any of the rules and regulations in these standards shall be in accordance with those prescribed in "Standard Methods For The Examination of Water and Wastewater," Fifteenth Edition, or any subsequent edition, "Methods for Chemical Analysis of Water and Waste" and "Methods for Benzidine, Chlorinated Organic Compounds, Pentachlorophenol and Pesticides in Water and Waste Water," or other generally accepted procedure approved by the Oklahoma Water Resources Board.

SECTION 9

ERRORS AND SEPARABILITY

Errors resulting from inadequate and erroneous data, human or clerical oversight will be subject to correction by the Oklahoma Water Resources Board. The discovery of such errors does not render the remaining and unaffected standards invalid.

If any provision of these standards, or the application of any provision of these standards to any person or circumstances is held to be invalid, the application of such provisions to other persons and circumstances and the remainder of the standards shall not be affected thereby.

* * * *

APPENDIX A

BENEFICIAL USES OF VARIOUS STREAM SEGMENTS

The following portions of Section 4, Standards for Water Quality, will apply to those streams not listed in this appendix: 4.3(d), 4.3(h)(1), 4.4, 4.10(a), 4.10(c), 4.10(d), and 4.10(e).

The concept of goals is incorporated in the beneficial use designations. A goal represents a beneficial use which may be attained at some future time. Attainment is based upon several factors, including reduction of natural sources, advances in treatment technologies for point sources, and further implementation of best management practices to control nonpoint sources.

Beneficial uses are assigned to specific streams in this appendix.

An asterisk (*) designates those streams in which further revisions are pending. These are streams for which it is determined that detailed study and analysis is required prior to major revisions to the designated beneficial uses. For these streams the current uses will remain in effect and administrative procedures will be utilized to improve the streams to the maximum extent possible. Each stream will receive a detailed study and review prior to the 1985 review of the standards.

This group is composed of two categories:

1. Those streams for which biological review did not reveal a clear understanding of the character of the stream.
2. Those streams for which a great amount of public concern has been expressed and which additional study and evaluation is needed to clarify the socio-economic desires for additional waste treatment.

A triangle (▲) designates those streams where a literature survey indicates the need for a re-evaluation of assigned beneficial uses, but where the biological review has not yet been accomplished.

In addition to the above there are many streams which will require additional study but have not yet been identified.

[Maps Omitted In Printing]

W.Q. Basin No. 1, Sheet 1

BENEFICIAL USE CODES

- ● Indicates designated beneficial use
- (•) Indicates a goal for the continuance or support of the beneficial use (beneficial use applies when diluent capacity is sufficient)
- 1 Primary warm water fishery
- 2 Secondary warm water fishery with primary warm water fishery as a goal
- 3 Class I irrigation
- 4 Class II irrigation with class I irrigation as a goal if natural conditions permit
- 5 Class III irrigation with class I irrigation as a goal if natural conditions permit

STREAM ORDER 1 2 3 4 5 6	STREAM SEGMENT	BENEFICIAL USES: PUBLIC & PRIVATE WATER SUPPLY	EMERGENCY WATER SUPPLY	FISH & WILDLIFE PROPAGATION	AGRICULTURE	HYDROELECTRIC POWER	M & I COOLING WATER	PRIMARY RECREATION	SECONDARY RECREATION	NAVIGATION	AESTHETICS	SMALLMOUTH BASS	TROUT FISHERIES	LIMITATIONS	REMARKS
ARKANSAS RIVER from mouth of Canadian River to the mouth of the Verdigris including Webbers Falls Reservoir	120400		●	1	●	●	●	●	●	●	●				
Dirty Creek	120400	●		●	●		●	●	●		●				
Lower ILLINOIS RIVER from headwaters of Robert S. Kerr Reservoir to Tenkiller Dam	121700	●		1	1			●	●	●	●	●	●		
Upper ILLINOIS RIVER from Tenkiller Dam, including Tenkiller Reservoir, to 650 foot elevation level	121700	●		1	1	●	●	●	●		●	●			
Caney Creek	121700	●		1	●			●	●		●	●			
BARREN FORK to Hwy 59	121700	●		1	3			●	●		●	●		a	Scenic River
Tyner Creek	121700	●		1	●			●	●		●	●		a	
Court House Creek	121700	●		1	●			●	●		●	●		a	
Ben Knight Creek	121700	●		1	●			●	●		●	●		a	
BARREN FORK, Hwy 59 to Arkansas State Line	121700	●		1	3			●	●		●	●		a	
Shell Branch	121700	●		1	●			●	●		●	●			
Evansville Creek	121700	●		1	●			●	●		●	●		a	
Upper ILLINOIS RIVER above 650 foot elevation level	121700	●		1	3			●	●		●	●		a	Scenic River
Flint Creek	121700	●		1	●			●	●		●	●		a	Scenic River
Ballard Creek	121700	●		1	●			●	●		●	●		a	
GREENLEAF CREEK including Greenleaf Lake	120400	●		1	●		●	●	●		●			a	

BEST AVAILABLE COPY

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APPENDIX C

DEFINITIONS OF POLLUTION RELATED TERMS

ABATEMENT

Reduction of the degree or intensity of pollution.

ALLOWABLE LOAD

For perennial streams—the allowable load for oxygen demanding substances shall be based on attaining an instream DO of 5.0 mg/L for primary warm water fisheries, 3.0 mg/L for secondary warm water fisheries, and 6.0 mg/L for those waters designated smallmouth bass or trout fisheries, at and above the seven-day, two-year low flow value, and at the critical temperature.

For intermittent streams—the allowable loading for oxygen demanding substances shall be based on attaining an instream DO of 5.0 mg/L for primary warm water fisheries, 3.0 mg/L for secondary warm water fisheries, and 6.0 mg/L for those waters designated smallmouth bass or trout fisheries, at and above 1.0 cfs, and at the critical temperature.

ALPHA PARTICLE

A positively charged particle limited by certain radioactive materials. It is the least penetrating of the three common types of radiation (alpha, beta, and gamma) and usually is not dangerous to plants, animals or humans.

AMBIENT

Surrounding, especially of or pertaining to the environment about an entity, but undisturbed and unaffected by it.

ANTI-DEGRADATION CLAUSE

A provision in water quality laws that prohibits deterioration of water quality in areas where pollution levels are presently below those allowed.

AQUIFER

A formation that contains sufficient saturated, permeable material to yield significant quantities of water to wells and springs. This implies an ability to store and transmit water; unconsolidated sands and gravels are a typical example.

ASSIMILATIVE CAPACITY

The amount of pollution a stream can receive and still recover without permanent damage or alteration of beneficial uses.

BENTHIC MACROINVERTEBRATES

Invertebrate animals that are large enough to be seen by the unaided eye and can be retained by a Standard No. 30 sieve, and live at least part of their life cycles within or upon available substrates in a body of water or water transport system.

BETA PARTICLE

A negatively charged elementary particle emitted by radioactive decay that may cause skin burns. It is easily stopped by a thin sheet of metal.

CARCINOGENIC

Cancer producing.

COLIFORM GROUP ORGANISMS

All of the aerobic and facultative anaerobic gram-negative, non-spore-forming rod shaped bacteria that ferment lactose broth with gas formation within 48 hours at 35°C.

COLOR

Color as used herein means true color as well as apparent color. True color is the color of the water from which turbidity has been removed. Apparent color includes not only the color due to substances in solution (true color), but also that color due to suspended matter.

CONSERVATIVE ELEMENT

A substance which persists in the environment, having characteristics which are resistant to ordinary biological degradation.

CRITICAL TEMPERATURE

The seven-day maximum temperature likely to occur with a 50% probability each year, or 90°F.

DISSOLVED OXYGEN (DO)

The amount of oxygen dissolved in water at any given time, depending upon the water temperature, the partial pressure of oxygen in the atmosphere in contact with the water, the concentration of dissolved salts in the water, and the physical aeration of the water.

EPILIMNION

The uppermost homothermal region of a stratified lake.

EUTROPHICATION (natural)

The normally slow aging process by which a lake evolves into a bog or marsh and ultimately assumes a terrestrial state. During eutrophication the lake becomes so rich in nutritive compounds (especially nitrogen and phosphorus) that algae and other microscopic plant life become superabundant, thereby

"choking" the lake, and causing the lake to advance in seral stages.

FECAL COLIFORM

A group of organisms common to the intestinal tracts of man and of animals. The presence of fecal coliform bacteria in water is an indicator of pollution and of potentially dangerous bacterial contamination.

GEOMETRIC MEAN

$G_m = \sqrt[n]{B_1 \times B_2 \times \ldots B_n}$

Where: n= number of samples
and B_n=the bacterial count for n^{th} sample.

GROUNDWATER BASIN

For the purposes of these standards a "groundwater basin" is a physiographic unit containing a system of interconnected aquifers forming a groundwater reservoir. This definition is not applicable for the purposes of groundwater use permitting under the Oklahoma Groundwater Law.

INTERMITTENT STREAM

A stream or reach of a stream that flows only at certain times of the year. In such streams the run-off from the watershed is smaller than the ground evaporation and seepage losses in the ground. For the purposes of these standards, 7 day 2 year low flow of 0 will be considered intermittent.

LC_{50}

Lethal Concentration—the concentration of a toxicant in an external medium that is lethal to fifty percent of the test animals for a specified period of exposure.

NATURAL SOURCE

Source of contamination which is not man induced.

NEPHELOMETRIC TURBIDITY UNIT (NTU)

This method is based upon a comparison of the intensity of light scattered by the sample under defined conditions with the intensity of light scattered by a standard reference suspension (formazin). The higher the intensity of scattered light, the higher the turbidity. Readings in NTU's are considered comparable to the previously reported Jackson Turbidity Units (JTU).

NON-CONSERVATIVE ELEMENT

A substance which undergoes degradation or change in the environment other than dilution.

NONPOINT SOURCE

A source of pollution without a well defined point of origin.

NUTRIENTS

Elements of compounds essential as raw materials for organisms growth and development; these include carbon, oxygen, nitrogen and phosphorus.

POLYCHLORINATED BIPHENYLS (PCBs)

Polychlorinated biphenyls, a group of organic compounds (206 possible) which is constructed of two phenyl rings and more than one chlorine atom. PCBs are used as an electrical insulating fluid in capacitors and transformers, and in the manufacture of plastics.

PERENNIAL STREAMS

A stream or reach of a stream that flows continuously throughout the year either due to watershed runoff or to inflow of the ground water to the stream.

PICOCURIE (pCi)

That quantity of radioactive material producing 2.22 nuclear transformations per minute.

POINT SOURCE

Any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, well, discrete fissure, container, rolling stock or concentrated animal feeding operation from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

POLLUTION

Contamination or other alteration of the physical, chemical or biological properties of any natural waters of the State, or such discharge of any liquid, gaseous or solid substance into any waters of the State as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life. (82 O.S. 1981, § 926.1(1)

PRIMARY WARM WATER FISHERIES

Water quality and habitat adequate to support sensitive warm water fish species in abundance. Environment suitable for the full range of warm water benthos.

SALINITY

The degree of salt in water.

SAMPLE STANDARD

The arithmetic mean of historical data plus two standard deviations of the mean.

SECONDARY WARM WATER FISHERY

Water quality and habitat not adequate to support sensitive warm water fish in abundance. This can be as a result of two conditions:

a) Habitat and natural physical-chemical characteristics not suitable for the full range of aquatic organisms.

b) Man induced conditions preclude the attainment of a full range of aquatic organisms including sensitive warm water fish species in abundance.

SEVEN-DAY, TWO-YEAR LOW FLOW

A seven-day, two-year low flow is specified as the design flow for determining allowable discharge load to a stream. The flow is calculated as a moving average of seven consecutive days for each year in a given record. These seven-day low flow values are ranked in ascending order. An order number (m) is calculated based upon the number of years record (n), with a recurrence interval (R) of two years, as $m = (n+1)/R$, where $R =$ two years. A value of flow corresponding to the m^{th} order is taken as the seven-day, two-year low flow for that historical data.

STANDARD DEVIATION

A statistical measure of the dispersion around the arithmetic mean of the data.

SIMILARITY INDEX

Where:

$$S = \frac{2C}{A+B}$$

A = No. of species in the sample at upstream station.

B = No. of species in the sample at downstream station.

C = No. of species common to both A and B.

SYNERGISTIC EFFECT

Indicates the presence of cooperative pollutant action such that the total effect is greater than the sum of the effects of each pollutant taken individually.

THERMAL POLLUTION

Degradation of water quality by the introduction of heated effluent. Primarily a result of the discharge of cooling waters from industrial processes particularly from electrical power generation.

THERMAL STRATIFICATION

Horizontal layers of different densities produced in a lake due to temperature.

WASTES

Industrial waste and all other liquid, gaseous or solid substances which may pollute or tend to pollute any waters of the State. (82 O.S. Supp. 1976, § 926.1 (2))

WATERS OF THE STATE

All streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations

of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this State or any portion thereof, except privately owned reservoirs used in the process of cooling water for industrial purposes, provided that water released from any such reservoir into a stream system of the State shall be and become waters of the State. (82 O.S. Supp. 1976, § 926.1 (6))

YEARLY MEAN STANDARD

The arithmetic mean of historical data plus one standard deviation of the mean.

OKLAHOMA'S

WATER QUALITY STANDARDS

1985

* * * *

SECTION 3

ANTI-DEGRADATION POLICY

Oklahoma's waters constitute a valuable State resource and shall be protected, maintained and improved for the benefit of all the citizens. The intent of the Anti-degradation Policy is to protect all waters of the State from degradation of water quality. Existing beneficial uses shall be maintained and protected. No water quality degradation which will interfere with the attainment or maintenance of designated beneficial uses shall be allowed.

It is recognized that certain waters of the State possess existing water quality which exceeds those levels necessary to support propagation of fishes, shellfishes, wildlife, and recreation in and on the water. These high quality waters shall be maintained and protected.

No degradation shall be allowed in waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in National and State parks, forests, wilderness areas, wildlife management areas, wildlife refuges, and streams designated as "critical habitat" under the Federal Endangered Species Act listed in Appendix B. These also include streams designated as "critical habitat" under the Federal Endangered Species Act listed in Appendix B. These also include streams designated Scenic River in Appendix A.

As the quality of Oklahoma waters improve, no degradation of such improved waters shall be allowed. When the moving yearly mean standard for a specific parameter improves to the point where the goals listed in Appendix C become attainable, degradation will be prohibited by incorporating the goal as a standard.

In cases where potential water quality impairment associated with a thermal discharge is involved, the anti-degradation policy and implementation method shall be consistent with Section 316 of Public Law 92-500 as amended by PL 92-217.

* * * *

SECTION 7.11 BENEFICIAL USE LIMITATIONS

All streams and bodies of water designated as (a) in Appendix A are protected by prohibition of any new point source discharge which increases pollutant loading or increased load from an existing point source. All stream segments designated in Appendix A as "scenic river" and the tributaries of those stream segments are hereby designated as (a). Best management practices for control of nonpoint source discharges should be initiated in these watersheds.

* * * *

Permit No. AR0020010

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Clean Water Act, (33 U.S.C. 1251 et. seq., the "Act"),

City of Fayetteville
P.O. Drawer F
Fayetteville, Arkansas 72701

is authorized to discharge from a facility with outfalls located at approximately:

White River Outfall No. 001 Latitude: 36°05′00″N
Longitude: 94°05′00″W

Mud Creek Outfall No. 002 Latitude: 36°05′25″N
Longitude: 94°06′38″W

to receiving waters named the White River-Outfall No. 001 (Segment 4K-White River Basin) and Mud Creek-Outfall No. 002 (Segment 3J-Arkansas River Basin)

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, III, and IV hereof.

This permit shall become effective on December 10, 1985.

This permit and the authorization to discharge shall expire at midnight, December 9, 1990.

Signed this 5th day of November 1985.

/s/ Myron O. Knudson
MYRON O. KNUDSON, P.E.
Director, Water Management Division (6W)

Permit No. AR0020010

PART I

SECTION A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

1. Final Effluent Limits

a. During the period beginning date of issuance and lasting through date of expiration the permittee is authorized to discharge to the White River from Outfall No. 001.

Such discharges shall be limited and monitored by the permittee as specified below:

Effluent Characteristic	Discharge Limitations		
	kg/day (lbs/day)	Other Units	
	30-day Avg	30-day Avg	7-day Avg
Flow *	N/A	* mgd	* mgd
Carbonaceous Biochemical Oxygen Demand ($CBOD_5$)			
December 1-March 31	235 (517)	10 mg/l	15 mg/l
April 1-November 30	117 (259)	5 mg/l	7 mg/l
Total Suspended Solids			
December 1-March 31	352 (776)	15 mg/l	22 mg/l
April 1-November 30	117 (259)	5 mg/l	7 mg/l
Ammonia Nitrogen			
December 1-March 31	117 (259)	5 mg/l	7 mg/l
April 1-November 30	47 (103)	2 mg/l	3 mg/l
Total Phosphorous	23 (52)	1 mg/l	2 mg/l
Fecal Coliform			
October 1-March 31	N/A	1000/100 ml	2000/100 ml
April 1-September 30	N/A	200/100 ml	400/100 ml
Residual Chlorine	N/A	.05 mg/l, maximum	
Dissolved Oxygen			
December 1-March 31	N/A	10 mg/l, minimum	
April 1-November 30	N/A	8 mg/l, minimum	

* Effluent flow must be monitored and reported. White River flow near Fayetteville (U.S.G.S. Station No. 7048600) must also be monitored daily and reported (30-day and 7-day averages). No discharge to the White River is permitted unless the stream flow is 50 cfs or more.

Effluent Characteristic	Monitoring Requirements	
	Measurement Frequency	Sample Type
Flow *	Daily	Totalizing Meter
Carbonaceous Biochemical Oxygen Demand ($CBOD_5$)	One/Day	12-Hour Composite
Total Suspended Solids	One/Day	12-Hour Composite
Ammonia Nitrogen	One/Day	12-Hour Composite
Total Phosphorous	One/Day	12-Hour Composite
Fecal Coliform Bacteria	One/Day	Grab
Residual Chlorine	One/Day	Grab
Dissolved Oxygen	One/Day	Grab

The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored by grab samples collected at the frequency shown above for Total Suspended Solids.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the discharge from the final treatment unit.

b. During the period beginning date of issuance and lasting through date of expiration the permittee is authorized to discharge to Mud Creek from Outfall No. 002.

Such discharges shall be limited and monitored by the permittee as specified below:

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* Effluent flow must be monitored and reported. White River flow near Fayetteville (U.S.G.S. Station No. 7048600) must also be monitored daily and reported (30-day and 7-day averages). No discharge to the White River is permitted unless the stream flow is 50 cfs or more.

Effluent Characteristic	Discharge Limitations		
	kg/day (lbs/day)	Other Units	
	30-day Avg	30-day Avg	7-day Avg
Flow *		* mgd	* mgd
Carbonaceous Biochemical Oxygen Demand ($CBOD_5$)			
December 1-March 31	235 (517)	10 mg/l	15 mg/l
April 1-November 30	117 (259)	5 mg/l	7 mg/l
Total Suspended Solids			
December 1-March 31	352 (776)	15 mg/l	22 mg/l
April 1-November 30	117 (259)	5 mg/l	7 mg/l
Ammonia Nitrogen			
December 1-March 31	117 (259)	5 mg/l	7 mg/l
April 1-November 30	47 (103)	2 mg/l	3 mg/l
Total Phosphorous	23 (52)	1 mg/l	2 mg/l
Fecal Coliform Bacteria			
October 1-March 31	N/A	1000/100 ml	2000/100 ml
April 1-September 30	N/A	200/100 ml	400/100 ml
Residual Chlorine	N/A	.05 mg/l, maximum	
Dissolved Oxygen			
December 1-March 31	N/A	10 mg/l, minimum	
April 1-November 30	N/A	8 mg/l, minimum	

Effluent Characteristic	Monitoring Requirements	
	Measurement Frequency	Sample Type
Flow *	Daily	Totalizing Meter
Carbonaceous Biochemical Oxygen Demand ($CBOD_5$)	One/Day	12-Hour Composite
Total Suspended Solids	One/Day	12-Hour Composite
Ammonia Nitrogen	One/Day	12-Hour Composite
Total Phosphorous	One/Day	12-Hour Composite
Fecal Coliform Bacteria	One/Day	Grab
Residual Chlorine	One/Day	Grab
Dissolved Oxygen	One/Day	Grab

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* Effluent flow must be monitored and reported. See Part III for additional requirements and limitations.

The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored by grab samples collected at the frequency shown above for Total Suspended Solids.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the discharge from the final treatment unit.

SECTION B. MONITORING AND REPORTING

1. The permittee shall effectively monitor the operation and efficiency of all treatment and control facilities and the quantity and quality of the treated discharge. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

a. If any seven-day average value exceeds the effluent limitations specified in Part I. A., the permittee shall report the excursion in accordance with the requirements of Part II. A.2.

b. Any 30-day or 7-day average reported in the required Discharge Monitoring Report which is in excess of the effluent limitation specified in Part I.A. shall constitute evidence of violation of such effluent limitation and of this permit.

c. The Regional Administrator may at his discretion require additional sampling, reporting, or monitoring including but not limited to the taking of at least one 12 hour composite sample and/or increased frequency of sampling.

d. Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

2. *Reporting*

a. All reporting (including written notifications, oral notifications, and discharge monitoring reports) required by this permit shall, unless otherwise specified, be made concurrently to:

(1) Director
Arkansas Department of Pollution
Control and Ecology
8001 National Drive
P.O. Box 9583
Little Rock, Arkansas 72209

(2) Director
Water Management Division (6W)
U.S. Environmental Protection Agency,
Region VI
InterFirst Two Building
1201 Elm Street
Dallas, Texas 75270

b. Monitoring information required shall be submitted on Discharge Monitoring Report Form EPA 3320-1.

(1) Duplicate original Discharge Monitoring Report forms, properly completed and signed (as per paragraph [2] below), must be submitted monthly.

(2) Each submitted Discharge Monitoring Report shall be signed by a duly authorized agent of the permittee in accordance with Part II. B.13.

(3) Reporting periods shall end on the last day of the month.

(4) The first Discharge Monitoring Report(s) shall represent facility operations from the effective date of the permit through the last day of the month.

(5) Thereafter, the permittee is required to make regular monthly reports as described above and shall sub-

mit those reports no later than the 25th day of the month following each reporting period.

(6) All values required on EPA Form 3320-1 shall be reported in accordance with the "General Instructions" provided on that form.

(7) Other measurements of oxygen demand (e.g., TOC and COD) may be substituted for five-day Biochemical Oxygen Demand ($CBOD_5$) where the permittee can demonstrate long-term correlation of the method with $CBOD_5$ values. Details of correlation procedures employed must be submitted and prior approval granted by the permitting authority for this procedure to be acceptable. Data reported must also include evidence to show that the proper correlation continues to exist after approval.

c. The Clean Water Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

3. *Test Procedures*

a. All sampling and analytical methods used to meet the monitoring requirements specified above shall conform to Section 304(h) of the Act and any regulations promulgated therefrom.

b. The permittee shall calibrate and perform maintenance procedures on all monitoring and analytical instrumentation at intervals frequent enough to insure accuracy of measurements and shall insure that both calibration and maintenance activities will be conducted.

c. An adequate analytical quality control program, including the analyses of sufficient standards, spikes, and duplicate samples to insure the accuracy of all required analytical results shall be maintained by the permittee or designated commercial laboratory.

d. The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than six months per violation, or both.

e. The analytical method used for Carbonaceous Biochemical Oxygen Demand shall conform to the procedure specified in "Standard Methods for the Examination of Water and Wastewater," 15th Edition.

4. *Recording*

The permittee shall record for each measurement or sample taken pursuant to the requirements of this permit the following information:

a. the date, exact place and time of sampling;
b. the dates analyses were performed;
c. who performed the analyses;
d. the analytical techniques or methods used,
e. the results of all required analyses, and
f. the instantaneous flow at grab sample collections.

5. *Additional Monitoring by Permittee*

If the permittee monitors any parameters more frequently than is required by this permit, he shall include the results of such monitoring in the calculation and reporting of the values required in the Discharge Monitoring Report (EPA Form 3320-1 [10-77]). Such increased

frequency shall be indicated on the Discharge Monitoring Report form.

6. *Records Retention*

The permittee shall retain records of all monitoring information and records of all data used to complete the application for this permit for a period of at least three years from the date of the sample, measurement, report, or application. This period may be extended by request of the Regional Administrator at any time.

Records of monitoring information shall conform to the requirements of 40 CFR 122.7(j).

PART II

SECTION A. MANAGEMENT REQUIREMENTS

1. *Change in Discharge*

a. The permittee shall give advance notice of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

b. Any change in the facility discharge (including the introduction of any new source or significant discharge or significant changes in the quantity or quality of existing discharges to the treatment system that may result in new or increased discharges of pollutants) must be reported to the permitting authority. In no case are any new connections, increased flows, or significant changes in influent quality permitted that will cause violation of the effluent limitations specified herein.

2. *Noncompliance Notification*

a. The permittee shall report all instances of noncompliance not reported under Part II, 2.b. below at the

time monitoring reports are submitted. The reports shall contain the following information:

(1) A description of the noncompliance and its cause;

(2) The period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and

(3) Steps being taken to reduce, eliminate, and prevent recurrence of the noncomplying discharge.

b. The following must be reported within 24 hours:

(1) Any unanticipated bypass which exceeds any effluent limitation in the permit;

(2) Any upset which exceeds any effluent limitations in the permit; and

(3) Violation of a maximum daily discharge limitation for any toxic pollutant or hazardous substance listed under Part III, A. to be reported within 24 hours.

Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances. The written submission shall contain the information listed in Part II, A.2.a. above.
The Regional Administrator may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

The permittee shall also report any other noncompliance which may endanger health or the environment (such as fish kills or other instances when timely reporting is desirable) in this manner.

3. *Bypassing*

Bypass or diversion of wastes from any portions of the treatment facilities is prohibited unless the following conditions are met:

a. Bypass is unavoidable to prevent loss of life, personal injury or severe property damage;

b. There are no feasible alternatives to bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if the permittee could have installed adequate backup equipment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance;

c. The permittee submits notice of an unanticipated bypass as required in Part II, A.2.b.; and

d. The permittee submits prior notice of an anticipated bypass, if possible at least ten days before the date of the bypass.

4. *Upsets*

An upset constitutes an affirmative defense to an enforcement action brought for noncompliance with technology-based permit effluent limitations if the following requirements are met.

A permittee who wishes to establish the affirmative defense of upset shall demonstrate through properly signed, contemporaneous operating logs, or other relevant evidence that:

a. An upset occurred and that the permittee can identify the specific cause(s) of the upset;

b. The permitted facility was at the time being properly operated;

c. The permittee submitted notice of the upset as required in Part II, A.2.b. of this permit; and

d. The permittee complied with any remedial measures under Part II, B.2.

5. *Duty to Reapply*

Permittees who wish to continue to discharge subsequent to the expiration date of their permit must apply for reissuance of the permit using proper forms, not less than 180 days prior to the permit expiration date.

6. *Transfer of Ownership or Control*

In the event of any change in control or ownership of facilities from which the authorized discharges emanate, the permittee shall submit a written agreement, at least 30 days in advance of the proposed transfer date, containing a specific date for transfer of permit responsibility and coverage between the current and new permittees.

7. *Other Information*

Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report, it shall promptly submit such facts or information.

SECTION B. MANAGEMENT RESPONSIBILITIES

1. *Duty to Comply*

a. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the appropriate Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

b. The permittee shall comply with effluent standards or prohibitions established under Section 307(a) of the Act for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

c. The Act provides that any person who violates a permit condition implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed $10,000 per day of such violation. Any person who willfully or negligently violates permit conditions implementing sections 301, 302, 306, 307, or 308 of the Act is subject to a fine of not less than $2,500 or more than $25,000 per day of violation, or by imprisonment for not more than one year, or both.

2. *Duty to Mitigate*

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

3. *Duty to Halt or Reduce not a Defense*

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

4. *Permit Flexibility*

a. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

b. After notice and opportunity for a hearing, this permit may be modified, suspended, or terminated during its term in accordance with 40 CFR 122.15-16.

5. *Facility Operation and Quality Control*

a. All waste collection, control, treatment and disposal facilities shall be operated in a manner consistent with the following:

(1) At all times, all facilities or systems of control shall be maintained in good working order and operated as efficiently as possible and in a manner which will minimize upsets and discharges of excessive pollutants;

(2) The permittee shall provide an adequate operating staff which is duly qualified to carry out the operation, maintenance and testing functions required to insure compliance with the conditions of this permit;

(3) Maintenance of treatment facilities that results in degradation of effluent quality shall be scheduled during noncritical water quality periods and shall be carried out in a manner approved by the permitting authority, as specified in Part II, A.3.c.

b. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems when necessary to achieve compliance with the conditions of the permit.

6. *Removed Substances*

Collected screenings, slurries, sludges, and other solids shall be disposed of in such a manner as to prevent entry of those wastes (or runoff from the wastes) into navigable waters or their tributaries.

7. *Power Failure*

The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures either by means of alternate power sources, standby generators, or retention of inadequately treated effluent.

8. *Availability of Reports*

Except for applications, effluent data, permits, and other data specified in 40 CFR 122.19, any information submitted pursuant to this permit may be claimed as confidential by the submitter. If no claim is made at the time of submission, information may be made available to the public without further notice.

9. *Duty to Provide Information*

The permittee shall furnish, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish, upon request, copies of records required to be kept by this permit.

10. *State Laws*

Nothing in this permit precludes more stringent State regulation of any activity covered by this permit.

11. *Property Rights*

This permit does not convey any property rights of any sort, or any exclusive privilege.

12. *Right of Entry*

The permittee shall allow the head of the State water pollution control agency, the Regional Administrator, and/or their authorized representatives, upon the presentation of credentials and such other documents as may be required by the law:

a. To enter upon the permittee's premises or other premises under the control of the permittee, where an effluent source is located or in which any records are

required to be kept under the terms and conditions of this permit.

b. To have access to and to copy, at reasonable times, any records required to be kept under the terms and conditions of this permit, or the Act;

c. To inspect at reasonable times any monitoring equipment or monitoring method required in this permit;

d. To sample at reasonable times any discharge of pollutants; or

e. To perform at reasonable times an operation and maintenance inspection of the permitted facility.

13. *Signatory Authority*

a. All permit applications shall be signed by a principal executive officer or ranking elected official. Discharge monitoring and other reports may be signed by an authorized representative provided that a written authorization has been submitted and that the representative so authorized is responsible for the overall operation of the facility from which the discharge originates.

b. A person signing any document shall make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under the direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

14. *Civil and Criminal Liability*

Except as provided in permit conditions on "Bypassing" and "Upsets", nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

15. *Severability*

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

PART III

SECTION A. OTHER REQUIREMENTS

1. *Contributing Industries and Pretreatment Requirements*

a. The permittee shall operate an industrial pretreatment program in accordance with section 402(b)(8) of the Clean Water Act and the General Pretreatment Regulations (40 CFR Part 403). The program shall also be implemented in accordance with the approved POTW pretreatment program submitted by the permittee which is hereby incorporated by reference.

b. The permittee shall establish and enforce specific limits to implement the provisions of 40 CFR § 403.5(a) and (b), as required by 40 CFR § 403.5(c). All specific prohibitions or limits developed under this requirement are deemed to be conditions of this permit. The specific prohibitions set out in 40 CFR § 403.5(b) shall be enforced by the permittee unless modified under this provision.

c. The permittee shall prepare annually a list of Industrial Users which, during the past twelve months,

have significantly violated pretreatment requirements. This list is to be published annually in the largest newspaper in the municipality during the month of April.

d. In addition, at least 14 days prior to publication, the following information is to be submitted to the EPA and the State for each significantly violating Industrial User:

(1) Condition(s) violated and reason(s) for violation(s),

(2) Compliance action taken by the City, and

(3) Current compliance status.

2. *Illinois River Basin Water Quality Protection Requirements*

a. *Noncompliant Effluent Prohibition*

(1) Should the effluent quality determinations reveal that the concentration of any pollutant exceeds the 7-day average discharge limitations specified in Part I, Section A of the permit, the discharge to Mud Creek shall be halted and not restarted until the plant effluent problem is corrected.

(2) Should the effluent quality determinations reveal that the concentration of any pollutant exceeds the 30-day average discharge limitations specified in Part I, Section A of the permit, the discharge to Mud Creek shall be halted and not restarted until the plant effluent problem is corrected.

(3) For the $CBOD_5$ parameter, the compliance determination will be made 6 days after the 7-day period under evaluation.

b. *Bypassing and Upsets*

(1) Effluent which has not received complete treatment (i.e., "bypassed" around any portion of the treatment plant) shall not be discharged to Mud Creek.

(2) During periods of short-term noncompliance with effluent limitations ("upsets"), no effluent shall be discharged to Mud Creek.

c. *Mud Creek Flow Limitations*

(1) The 30-day average flow of treated effluent discharged to Mud Creek shall not exceed 50 percent of the 30-day average flow of treated effluent from the plant.

(2) The 30-day average flow of treated effluent discharged to Mud Creek shall not exceed 6.1 million gallons per day (mgd).

d. *Permit Modification*

(1) A joint Arkansas/Oklahoma/EPA water quality study of the Illinois River Basin is currently being conducted to determine the existing water quality, causative factors, and possible nutrient control measures.

(2) If the findings of this study indicate that more stringent limitations for Fayetteville's effluent are necessary to insure that water quality standards are met, then this permit will be modified to incorporate the more stringent limitations. This may require that additional treatment be provided or that City's discharge to Mud Creek cease.

PART IV

SECTION A. DEFINITIONS

All definitions contained in Section 502 of the Act shall apply to this permit and are incorporated herein by reference. Additional definitions of words or phrases used in this perimt are as follows:

1. "Act" means the Clean Water Act, Public Law 95-217 (33 U.S.C. 1251 et seq).

2. "Administrator" means the Administrator of the U.S. Environmental Protection Agency.

3. "Applicable effluent standards and limitations" means all State and Federal effluent standards and limitations to which a discharge is subject under the Act, including, but not limited to, effluent limitations, standards of performance, toxic effluent standards and prohibitions, and pretreatment standards.

4. "Applicable water quality standards" means all water quality standards to which a discharge is subject under the Act and which have been (a) approved or permitted to remain in effect by the Administrator following submission to her pursuant to section 303(a) of the Act, or (b) promulgated by the Administrator pursuant to section 303(b) or 203(c) of the Act.

5. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

6. "Environmental Protection Agency" means the U.S. Environmental Protection Agency.

7. "Grab sample" means an individual sample collected in less than 15 minutes.

8. "Industrial User" means a nondomestic discharger, as identified in 40 CFR 403, introducing pollutants to a publicly owned treatment works.

9. "National Pollutant Discharge Elimination System" means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of the Clean Water Act.

10. "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

11. "Sewage sludge" means the solids, residues, and precipitate separated from or created in sewage by the unit processes of a publicly owned treatment works. Sewage as used in this definition means any wastes, including wastes from humans, households, commercial establishments, industries, and storm water runoff, that are discharged to or otherwise enter a publicly owned treatment works.

12. "7-day average", other than for fecal coliform bacteria, is the arithmetic mean of the values for all effluent samples collected during the calendar week. The 7-day average for fecal coliform bacteria is the geometric mean of the values for all effluent samples collected during the calendar week.

13. "30-day average", other than for fecal coliform bacteria, is the arithmetic mean of the values for all effluent samples collected during a calendar month. The 30-day average for fecal coliform bacteria is the geometric mean of the values for all effluent samples collected during a calendar month.

14. "12-hour composite sample" consists of 12 effluent portions collected no closer together than one hour and composited according to flow.

15. "6-hour composite sample" consists of six effluent portions collected not closer together than one hour (with the first portion collected no earlier than 10:00 A.M.) and composited according to flow.

16. "3-hour composite sample" consists of three effluent portions collected no closer together than one hour (with the first portion collected no earlier than 10:00 A.M.) and composited according to flow.

17. "Treatment works" means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage and industrial wastes of a liquid nature to implement section 201 of the Act,

or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, sewage collection systems, pumping, power and other equipment, and their appurtenances, extension, improvement, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities, and any works, including site acquisition of the land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment.

18. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improper designed treatment facilities, lack of preventive maintenance, or careless or improper operation.

19. For fecal coliform bacteria a sample consists of one effluent grab portion collected during a 24-hour period at peak loads.

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

Nos. 90-1262, 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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In No. 90-1262

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QUESTIONS PRESENTED

The Clean Water Act provides that all publicly and privately owned facilities intending to discharge any effluent into the nation's waters must obtain a discharge permit from the U.S. Environmental Protection Agency or from a designated agency in the source state. To obtain a permit under this National Pollutant Discharge Elimination System (NPDES), the facility (or point source) must demonstrate that the discharge will both meet the technology-based effluent limitations set by EPA and comply with the approved water quality standards of the source state.

At issue in this petition is whether the court of appeals erred by holding that the Clean Water Act imposes two further conditions on the issuance of NPDES permits. The specific questions raised by the court's decision and this case are:

(1) Whether a facility must also comply with the water quality standards of all downstream states, regardless of their terms and severity, and furthermore, whether EPA lacks any discretion in applying those downstream standards; and

(2) Whether a pre-existing violation of water quality standards on any downstream segment, in either the source state or any downstream state, automatically precludes the issuance of new permits.

PARTIES TO THE PROCEEDINGS

The State of Arkansas, the Arkansas Department of Pollution Control & Ecology (A.D.P.C. & E.), the City of Fayetteville, Arkansas and the Beaver Water District, petitioners in No. 90-1262 before this Court, were all cross-petitioners in the court of appeals.

The U.S. Environmental Protection Agency (EPA) was the respondent in the court of appeals and is the petitioner in No. 90-1266 before this Court.

The State of Oklahoma, the Oklahoma Scenic Rivers Commission, the Oklahoma Pollution Control Coordinating Board, and Save The Illinois River (STIR) were petitioners in the court of appeals, and the Oklahoma Wildlife Federation was an intervenor on the side of Oklahoma. These Oklahoma parties are all respondents in both cases before this Court.

All of the Arkansas parties appearing as petitioners are governmental and public entities and have no subsidiaries, affiliates, or parent corporations. *See* Supreme Court Rule 29.1.

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Supreme Court Rule 29.1 ii

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1262

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

No. 90-1266

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF PETITIONERS In No. 90-1262

This case presents two fundamental questions affecting the regulation of the nation's waterways under the Clean Water Act: first, whether downstream state standards *must* be applied when making permit decisions for sources in upstream states, and second, whether the inability or failure of a waterway to attain existing state standards triggers a mandatory ban on new discharges into that waterway and its tributaries. The U.S. Court of Appeals for the Tenth Circuit adopted a rigid construction of the Act on both questions, which effectively eliminates the discretion of the permitting agencies that administer the Act.

The Arkansas parties [1] submit that this construction conflicts with Congress' affirmative assignment of responsibility to EPA and state permitting agencies for resolution of these questions on a case-by-case basis. The Tenth Circuit therefore misinterpreted the Act and exceeded its role as a reviewing court by overturning EPA's permit decision in this case.

OPINIONS BELOW

The Tenth Circuit's decision is reported at 908 F.2d 595 (1990) and reprinted at Ark. P.A. 1a-86a. The four decisions by the Administrative Law Judge and the Chief Judicial Officer for the U.S. Environmental Protection Agency (EPA), which upheld the issuance of the permit in this case, are reprinted at Ark. P.A. 93a-107a, 108a-121a, 122a-144a, and 145a-153a. The permit is reprinted at J.A. 66-87.

JURISDICTION

The court of appeals entered its judgment on July 11, 1990. Ark. P.A. at 91a-92a. The court denied timely filed petitions for rehearing and rehearing *en banc* on October 11, 1990. Ark. P.A. at 87a-88a. The Tenth Circuit nevertheless granted a stay of mandate on October 31, 1990 pending the timely filing of petitions for certiorari. Ark. P.A. at 89a. This Court granted certiorari on April 1, 1991, and the mandate remains stayed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved here is the Federal Water Pollution Control Act, commonly referred to as the Clean

[1] The Arkansas parties include the State of Arkansas, the Arkansas Department of Pollution Control & Ecology, the City of Fayetteville, Arkansas, and the Beaver Water District. The Appendix to the petition for certiorari filed by these parties is cited here as "Ark. P.A.," and the Joint Appendix filed by all the parties as "J.A."

Water Act (CWA), 33 U.S.C. §§ 1251-1387.[2] The provision enacted in 1972 specifically to address the relevance of downstream state standards in the permitting process is section 402(b)(5). This section applies directly to permitting agencies in the thirty-nine states now authorized to administer their own permit programs and requires those agencies:

> To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to accept such recommendations together with its reasons for so doing.

Section 402(a)(3), which applies where EPA acts as the permitting agency, incorporates this same provision by specifying that EPA's program "shall be subject to the same terms, conditions and requirements as apply to a State permit program." Other relevant provisions of the CWA, including sections 301, 303, 401 and 510, are reprinted in Ark. P.A. at 154a-171a.

STATEMENT OF THE CASE

In the 1972 Amendments to the Clean Water Act, Congress created the National Pollution Discharge Elimination System (NPDES) and required every point source that discharges effluent into the waters of the United States to obtain a discharge permit. CWA § 402. Each applicant for the NPDES permit must meet two sets of conditions. First, each discharger must comply with national uniform technology-based effluent limitations that have been established by EPA for different

[2] For the Court's convenience, citations throughout are to the sections of the CWA. Parallel citations to the U.S. Code are provided in the Table of Authorities and in Ark. P.A. at 154a-171a.

categories and classes of discharges. CWA § 301(b)(1). Second, each discharger must ensure compliance with the applicable ambient water quality standards that have been established by the source state and then approved by EPA. CWA § 303. An NPDES permit translates both of these conditions into a single set of effluent limitations that a discharging facility must meet.

Factual Background. The City of Fayetteville, like most major municipalities, operates a wastewater treatment plant that collects and treats the wastewater produced by industrial, commercial, and residential facilities. Until recently, Fayetteville relied upon a plant built some twenty years ago that used older technology and had become responsible for fish kills and frequent violations of Arkansas' water quality standards on the White River. To correct this situation, Fayetteville decided to build a new, state-of-the-art plant incorporating the most sophisticated treatment technology that was currently available.[3]

After conducting numerous studies and approximately forty public hearings, Fayetteville chose a split-flow discharge design that would divide the facility's effluent into two equal discharge streams. Half of the effluent would be discharged into the White River, which flows into Beaver Reservoir approximately ten miles downstream from the point of discharge. Beaver Reservoir is the source of drinking water for most of Northwest Arkansas. The remaining effluent would be discharged into an unnamed creek, which flows two miles later into Mud Creek, which flows three miles more to Clear Creek, which then flows another thirteen miles before reaching the Illinois River. Twenty-two miles further downstream,

[3] The new Fayetteville plant, which cost $40 million to build, uses a combination of biological phosphorous removal and nitrification, rapid sand filtration, post-aeration, dechlorination, and effluent storage, in addition to conventional types of treatment. Even the Oklahoma Department of Health has acknowledged that the Fayetteville plant would provide the most thorough and complete treatment available and would result in no noticeable impact on water quality. *See* Ark. P.A. at 135a.

and approximately forty miles downstream from the point of the Fayetteville discharge, the Illinois River crosses the border into Oklahoma.[4]

The Agency Proceedings. In response to the application Fayetteville submitted for its new facility, EPA published a draft NPDES permit in July 1985 and held a public hearing on the proposed permit in August 1985.[5] Based on the evidence presented at the hearing, EPA issued a permit to the Fayetteville facility in November 1985.[6] In approving this permit, EPA found that the plant's proposed split-flow discharge would comply with the federally-approved Arkansas water quality standards on both the White and Illinois Rivers.

Moreover, the Agency found that the discharge would have *no* adverse impact on the water quality of Oklahoma, and therefore the section 401 requirement to notify an affected state and hold a public hearing on the interstate effects of the proposed permit was not triggered. *See* Ark. P.A. at 100a. The selection of the split-flow design for the Fayetteville facility minimizes any adverse environmental impact by utilizing the natural assimilative capacity of both the White and Illinois River basins.[7]

[4] Fayetteville chose this split-flow discharge because it minimized the overall environmental impact of the discharge, as explained below, and because it has the virtue of returning effluent to the same river basin generated the waste. Over half of the population that sends its wastewater to the Fayetteville facility lives in the Illinois River basin.

[5] EPA was the permitting agency because Arkansas had not been delegated permitting authority at the time of the original permit application. Arkansas' permit program has since been approved by EPA.

[6] The permit imposes very stringent limitations on the effluent that may be discharged by the facility, and also provides for even stricter limits if an ongoing study of the Illinois River shows a need for additional restrictions. *See* J.A. 84.

[7] "Assimilation" refers to the natural mechanisms in a waterway which remove nutrients such as phosphorous and nitrogen from the water, and includes processes such as sedimentation and incorporation into living organisms.

While discharging the entire effluent into either river basin would likely overwhelm a single river's assimilative mechanisms during some periods, the low concentration of nutrients in the effluent will be almost completely absorbed if the discharge is split between the two river basins.

Oklahoma and Arkansas have had a number of disputes over interstate waterways, however, and Oklahoma requested an evidentiary hearing in December 1985 to challenge the discharge into the Illinois River tributaries. EPA's Regional Administrator rejected most of Oklahoma's objections on their face, but did grant Oklahoma the opportunity to contest—at a discretionary hearing—EPA's determination that the Fayetteville discharge would not violate Oklahoma's water quality standards. The parties then submitted extensive expert testimony, and EPA's Administrative Law Judge (ALJ) conducted a three-day evidentiary hearing on this issue. After considering all of the evidence, the ALJ issued an initial decision upholding the permit. Ark. P.A. at 95a. The ALJ found that any adverse effect of the Fayetteville discharge on Oklahoma water quality "would be *de minimis* at most" and that the discharge would not have any "undue impact" on Oklahoma waters. *Id.* at 103a.

In response to Oklahoma's appeal, EPA's Chief Judicial Officer (CJO), acting for the Administrator, determined that the proper legal standard to apply in this case was whether the Fayetteville discharge would "cause an actual *detectable* violation of Oklahoma water quality standards." Ark. P.A. at 117a (emphasis in original). Thus, while the CJO did agree to require compliance with the Oklahoma standards in this case, the CJO recognized that an assessment of detectability was necessary for determining "compliance" under EPA's regulations and interpretation of the Act. *Id.* at 117a n.16. If the effect of the Fayetteville discharge on Oklahoma water quality was "not expected to be actually detectable or measurable," the ALJ should uphold the permit. *Id.*

On remand, the ALJ applied this legal test and concluded that the Fayetteville discharge would comply with each relevant Oklahoma water quality standard. Ark. P.A. at 122a. In weighing all the evidence presented in the pre-filed testimony and at the hearing, the ALJ rejected much of the testimony by Oklahoma's witnesses because it was based on incorrect assumptions and was substantially retracted or undermined during cross-examination. *See, e.g.*, Ark. P.A. at 131a, 136a. Based on the record in its entirety, the ALJ found that the Fayetteville discharge would have no detectable effect on Oklahoma water quality, would not in any way affect public health, and would not violate the Oklahoma standards for nutrients, aesthetics, dissolved oxygen, metals, or beneficial use limitations. Ark. P.A. at 126a-143a. In fact, the ALJ found that the Fayetteville effluent was so clean that it would actually *improve* several water quality parameters in the Illinois River in Oklahoma.[8] The ALJ's findings were upheld by the CJO on appeal by the Oklahoma parties. Ark. P.A. at 151a. The permit then went into effect, and the plant started operating under its approved permit in January 1989.

The Court of Appeals' Decision. Still unhappy with EPA's permit decision, the Oklahoma parties sought judicial review in the U.S. Court of Appeals for the Tenth Circuit. A protective petition filed by the Arkansas parties in the Eighth Circuit was also transferred to the Tenth Circuit, and that court ultimately reversed EPA's permit decision. On the first question presented here, the Tenth Circuit interpreted the Clean Water Act as

[8] *See, e.g.*, Ark. P.A. at 139a (discharge will result in net improvement of dissolved oxygen levels). Moreover, the evidence showed that the extremely low concentration of phosphorus in the Fayetteville effluent (the pollutant of greatest concern at the hearing) would be almost completely assimilated before reaching the Oklahoma border. Thus, because it will contribute proportionally more water than phosphorous, the Fayetteville discharge would actually result in a net *decrease* in the phosphorous concentration of the Illinois River as it enters Oklahoma.

requiring sources in upstream states to comply with any and all federally approved water quality standards of downstream states. Ark. P.A. at 43a. In reaching this conclusion, the court found that the statutory language and legislative history did not clearly reveal Congress' intent. *Id.* at 18a-19a, 42a-43a. Nevertheless, EPA had decided to require compliance in this case with the Oklahoma standards, and based on its view of the Act as a whole, the Tenth Circuit concluded that mandating compliance with downstream state standards was "reasonable and consistent with Congress's purposes in enacting the CWA." *Id.* at 19a.

The court sharply disagreed with EPA's application of this requirement, however. In particular, the Tenth Circuit rejected EPA's interpretation of Oklahoma's water quality standards, and held that EPA was not entitled to any discretion in interpreting or applying those standards. Ark. P.A. at 45a-53a. Moreover, the court summarily rejected the CJO's interpretation of the Act and regulations as providing that, so long as the Fayetteville discharge would not cause any "detectable" violation of the downstream Oklahoma standards, the discharge here would "comply" as a matter of federal law with those standards. *See id.* at 53a; *supra* pages 6-7. When combined with the court's decision that downstream state standards must be applied, this construction of the statutory scheme eliminates all flexibility for EPA and state permitting agencies and instead grants downstream states an unfettered veto power over permits in upstream states, regardless of how extreme or unfair the application of the downstream standards might be.

In the holding giving rise to the second question presented, the Tenth Circuit then ruled that another requirement, which the court found implicit in the statutory scheme though not addressed by the parties, absolutely precluded issuance of the permit in this case. Specifically, the court held that any pre-existing violation of a downstream water quality standard triggers a mandatory ban on new permits for upstream discharges that contain the

same pollutant. Ark. P.A. at 53a-54a, 79a-80a. This permit ban even precludes discharges that would have no detectable effect on downstream water quality, provided *some* amount of the effluent, albeit undetectable, is predicted to reach the downstream segment with the existing violation.

Since EPA had made no findings regarding this new requirement, the court undertook its own "examination" of the record and found that Oklahoma's anti-degradation policy was being violated before the Fayetteville facility began discharging. *Id.* at 55a-64a. Given the court's first holding that these Oklahoma standards apply to upstream Arkansas facilities, the Tenth Circuit therefore concluded that this pre-existing downstream violation operated as an absolute ban on the new Fayetteville discharge, irrespective of the fact that Fayetteville did not cause or contribute to the existing violation, and regard'ess of how stringently Fayetteville controls its effluent.

SUMMARY OF ARGUMENT

The court of appeals went far beyond the proper role of a reviewing court in deciding both of the questions presented. As this Court has emphasized in a series of recent decisions, reviewing courts must respect the plain statutory language and the expressed intent of Congress. *See, e.g., Chevron, U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S 837, 842-43 (1984). When Congress has spoken, courts are not free to ignore that direction. Furthermore, even on issues where Congress' intent is ambiguous, courts are not free simply to impose their own interpretation, regardless of whether they believe that interpretation would best serve the statutory purposes. Rather, the agencies delegated this responsibility by Congress must resolve such questions in the first instance and reconcile the competing policies underlying most statutory schemes. *Id.*

Congress *has* spoken to both of the questions presented here, and it provided a different answer than the Tenth

Circuit. On the first issue, Congress specifically gave permitting agencies the discretion to make permit applicants satisfy a downstream state's water quality standards. A source state's standards are directly applicable; a downstream state's standards are neither applicable nor wholly irrelevant. Rather, Congress intended for permitting agencies to decide on a case-by-case basis whether to impose additional conditions on a discharger, in light of the downstream state standards and a facility's impact on that state's water quality. By interpreting the Clean Water Act to always require unswerving compliance with a downstream state's standards, and eliminate all discretion for permitting agencies, the Tenth Circuit more than ignored Congess' intent. It adopted a construction foreclosed by that intent and the specific provisions Congess enacted to address the issue. *See infra* Section I.

The Tenth Circuit's decision on the second issue is even more severely flawed. As demonstrated by several provisions in the Act that the court never once mentioned, Congress intended to afford broad latitude to the states whose waterways had not yet attained the applicable water quality standards. Over time, those waterways must be brought into compliance, but individual states determine the timetable, set the priorities, and have authority to allocate the burden across all dischargers. The Tenth Circuit's imposition of an immediate and absolute permit ban, based on its view of the statutory purposes, thus conflicts irreconcilably with Congress' intent. Moreover, even if the court somehow thought Congress' intent was ambiguous, the responsibility for developing a nonattainment "remedy" rested with EPA, and EPA's current administration of the Act also precludes the court's remedy. *See infra* Section III.

The Tenth Circuit therefore lacked any basis for overturning the Fayetteville permit. Indeed, even if a downstream state's standards were legally applicable to out-of-state sources, the findings EPA made in this case adequately supported issuance of the permit. As part of its

permit decision, EPA determined that the Fayetteville facility would comply with the Oklahoma standards, because the discharge would not have any detectable effect on Oklahoma's water quality. This determination comes well within the Agency's discretion. Moreover, the "errors" found by the court in EPA's permit decision are demonstrably harmless and could not have affected the ultimate conclusion to grant the permit. *See infra* Section II. Accordingly, the Tenth Circuit's decision should be reversed, the Oklahoma challenges dismissed, and the Fayetteville permit upheld.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT MAKE DOWNSTREAM STATE STANDARDS BINDING IN PERMIT DECISIONS FOR OUT-OF-STATE FACILITIES.

When Congress rewrote the Clean Water Act in 1972 and created the NPDES permit system, it expected the program would be administered principally by the states. Accordingly, Congress created a regulatory structure that maintained individual state responsibility, yet also contained provisions that would force progressive improvement in the quality of the nation's waters. As the primary mechanism to improve water quality, Congress relied on technology-based effluent limitations that would be set by EPA and periodically upgraded to reflect improvements in control technology.[9]

As a supplementary mechanism, Congress also retained a requirement that states adopt and enforce ambient

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[9] CWA § 301(b)(1). *See* S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Senate Comm. on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1415, 1425 (1973) (hereinafter Leg. Hist. of 1972) (the 1972 Amendments propose "a major change in the enforcement mechanism of the federal water pollution control program from water quality standards to effluent limits"). *See also EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976).

water quality standards. CWA § 303. To promote nationwide uniformity in these standards, Congress directed EPA to review the standards adopted by states and ensure that the standards meet federal minimum requirements. In light of the possibility that some adjoining states might still adopt inconsistent standards, however, Congress created a specific procedure in the 1972 Amendments for resolving interstate disputes over water quality.

In creating this procedure, Congress chose not to enact a rigid rule making downstream state standards automatically applicable or a rule making them wholly irrelevant. Rather, the procedure Congress enacted requires permitting agencies to decide on a case-by-case basis whether additional effluent limitations are necessary to protect the waters of downstream states. The Tenth Circuit thus misconstrued the Act by mandating strict compliance with downstream state standards, and as shown in Section I.B below, the court otherwise lacked any statutory basis for overturning EPA's finding that no additional limitations were needed here to protect Oklahoma waters.

A. Congress Specifically Granted Permitting Agencies Discretion In Their Consideration Of Downstream State Standards.

Congress' unambiguous intent that permitting agencies be given case-by-case discretion in their consideration of downstream state standards is demonstrated by the specific statutory provisions Congress enacted to govern interstate water quality disputes. The Clean Water Act's legislative history and its other provisions striking a careful balance among state and federal powers further compel this interpretation of Congress' intent and the Act. *See infra* pages 18-31. Indeed, in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), this Court has already rejected once the contrary interpretation adopted by the Tenth Circuit, and Congress also rejected that interpretation when it decided against amending the Act in 1987.

1. The Provisions Congress Enacted To Govern Interstate Water Quality Disputes Do Not Require Automatic Compliance With The Standards Of Downstream States.

The central provision in the Clean Water Act for resolving interstate water quality disputes is section 402(b)(5). This section is the controlling provision both when the source state and when EPA has permitting authority. Section 402(b)(5), which was included as part of the NPDES permit program enacted in the 1972 CWA Amendments, provides for a consultative mechanism which requires permitting agencies to consider the standards of downstream states, but does not require the automatic application of those standards.[10] Under this scheme, EPA is given ultimate authority to determine on a case-by-case basis whether a permit should contain additional conditions in light of downstream state water quality standards.

As this Court is all too well aware, interstate disputes about water quality antedated the permit program established by the 1972 CWA Amendments.[11] Recognizing that these disputes involve sensitive issues of federalism and state sovereignty, Congress enacted specific provisions assuring that the legitimate interests of both upstream and downstream states would be considered. In the event that states cannot resolve their differences, the Act makes EPA the federal arbiter to ensure that disputes are resolved equitably.

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[10] By providing special provisions that specifically address only the application of downstream standards, it is clear that Congress intended permitting agencies to treat downstream standards differently than source state standards. By treating the two types of standards identically, the Tenth Circuit's holding contradicts Congress' scheme.

[11] *See, e.g., Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *New York* v. *New Jersey*, 256 U.S. 296 (1921); *Missouri* v. *Illinois*, 200 U.S. 496 (1906).

Section 402(b)(5), the specific provision intended by Congress to resolve interstate disputes, applies directly when the source state acts as the delegated permitting authority, which Congress expected to become the norm over time.[12] Under section 402(b)(5), the permitting agency in the source state must provide an opportunity for any "affected" state to submit written recommendations with respect to a proposed permit. Neither this provision nor any other section of the Act, however, imposes an affirmative obligation on the permitting agency to accept the downstream state's recommendations. Instead, section 402(b)(5) recognizes that the state permitting agency may well decline to accept those recommendations, and in that event, expressly requires *only* that the permitting agency notify the downstream state of its reasons for *not* accepting that state's recommendations.

Furthermore, section 402(d)(2) provides that if the source state decides not to accept a downstream state's recommendations, EPA is authorized but *not required* to veto the permit. EPA's decision on whether to veto a permit is completely discretionary with the Agency, and a decision to *not* veto a permit is not subject to judicial review. *District of Columbia* v. *Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980).[13] Thus, when downstream and source states differ over whether a proposed discharge should be permitted, section 402(b)(5) requires both states to articulate the reasons for their positions. The source state

[12] Thirty-nine states have now been delegated permitting authority, and thus section 402(b) directly applies to most NPDES permits. [1 State Water Laws] Env't Rep. (BNA) 611:0111 (Mar. 1990).

[13] *See also Mianus River Preservation Comm'n* v. *EPA*, 541 F.2d 899, 907-09 (2d Cir. 1976) (the decision to not veto a permit is committed to the agency's "almost unfettered discretion"); *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282, 1294-95 (5th Cir. 1977) ("the legislative history makes very clear that Congress intended EPA to retain discretion to decline to veto a permit even after the agency found some violation of application guidelines").

agency then makes the decision whether to impose additional limitations in the permit, and EPA can review the written justifications for each state's position to determine whether the source state has adequately protected the interests of the downstream state.

Congress provided the same discretionary authority for situations where EPA acts as the permitting agency, by incorporating section 402(b)(5) into section 402(a). In particular, section 402(a)(3) provides that NPDES permits issued by EPA "shall be subject to the same terms, conditions, and requirements" as apply to state permits under section 402(b). Together, sections 402(a) and 402(b) serve as the source of authority for both EPA and state agencies to issue permits under the NPDES system, and this focal provision expressly treats downstream state standards as a relevant, but not necessarily binding, consideration.

Although the provisions that Congress retained in 1972 from the predecessor legislation are less probative, the same intent to focus on source state requirements and allow discretionary treatment of downstream state standards is reflected in section 401(a) of the Act, which Congress adopted in 1970 before creating the NPDES permit program.[14] Specifically, section 401(a)(2) requires EPA to determine whether the approval of a federal permit or license by a federal agency may "affect" the water quality of a downstream state. If EPA makes such a threshold determination, section 401(a)(2) requires EPA to notify the downstream state and then requires the federal permitting authority to consider any recommendations by an objecting state, along with any other evidence presented at a hearing. Significantly, this entire process applies only if EPA makes a threshold determination that the discharge may adversely affect the quality of a downstream state's waters, at which point the federal agency becomes ultimately responsible for consid-

[14] Federal Water Pollution Control Act Amendments, Pub. L. No. 91-224, § 102, 84 Stat. 91, 108 (1970) (enacting § 21(b)(2)).

ering all the recommendations and determining whether additional effluent restrictions are needed to protect the downstream state's water quality.[15]

Congress provided further evidence in section 401 (a) (1), a corollary 1970 provision, of its intent to focus on source state requirements and give permitting agencies more discretion regarding downstream state standards. This section requires the federal permitting authority to obtain a certification from the source state that the proposed discharge would comply with its requirements, including water quality standards. CWA § 401 (a) (1). If Congress also had intended strict and automatic compliance with the standards of a downstream state, it no doubt would have required certification from that state as well. Instead, however, Congress purposefully rejected multi-state certification in favor of requiring certification only from the source state when it selected the section 401 (a) (1) procedure and rejected a competing proposal to require certification from both the source state *and* any other affected state.[16] Thus,

[15] To the extent that section 401 (a) (2) and section 402 (b) (5) elaborate these requirements differently, section 402 is obviously controlling since it applies specifically only to NPDES permits and the language of section 401 was adopted in 1970, prior even to the creation in 1972 of the NPDES permitting program. Furthermore, since section 402 (b) (5) unambiguously gives state permitting agencies discretion in considering downstream state standards, and Section 401 (a) (2) does not apply to the state agencies, it would be highly anomalous to read section 401 (a) (2) as requiring strict compliance when EPA acts as the permitting agency under section 402 (a). Such a reading would make the substantive outcome of permit proceedings depend on the "fortuitous circumstances" of whether the source state had been delegated permitting authority by EPA. *See Costle* v. *Pacific Legal Foundation*, 445 U.S. 194, 197 (1980) ("we are unwilling to read the Act as creating such a seemingly irrational bifurcated system"). Moreover, it is inconceivable that Congress intended to give federal permitting authorities *less* discretion than source state permitting agencies when considering downstream standards.

[16] *Compare* H.R. Rep. No. 127, 91st Cong., 1st Sess. (1969), *reprinted in* 1970 U.S. Code Cong. & Admin. News 2691, 2710 (requiring certification from "the affected State or States") *with* Pub. L. No. 91-224, § 102, 84 Stat. 91, 108 (1970) (requiring certification only "from the State in which the discharge originates").

while section 401 (a) (1) does require certification and strict compliance with the standards of the source state, Congress deliberately required federal permitting agencies only to *consider* the *recommendations* of a downstream state.

This Court has already recognized in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), that sections 402 (b) and 401 (a) (2) are the key provisions enacted by Congress to resolve interstate water quality disputes. Furthermore, this Court expressly relied upon the interpretation of those provisions outlined above in holding that the Act preempted the application of downstream state law against out-of-state sources.[17] The Court explained that in enacting sections 402 (b) and 401 (a) (2), Congress provided a specific mechanism for resolving interstate

[17] Oklahoma has contended, and the Tenth Circuit concluded, that section 301 (b) (1) (C), rather than section 402 (b) (5), is the controlling statutory provision for deciding whether a permitting agency must automatically apply the standards of a downstream state. *See* Ark. P.A. at 19a-23a; Okl. Br. Opp. at 16-17. However, section 301 (b) is a general timing provision that describes the deadlines for meeting the statutory goals, as the heading of the subsection itself indicates. Moreover, unlike section 402 (b) (5), this provision does not specifically address the issue of interstate water quality disputes. Contrary to the Tenth Circuit's assumption, the word "any" in "any State law or regulations," as used in section 301 (b) (1) (C), modifies "law or regulations," rather than "States." The word therefore does not in any way signify that this phrase includes the standards of downstream states. Similarly, the phrase "applicable water quality standard" appearing later in this subsection does not even begin to address the question of whether a downstream state's standards are, in fact, "applicable." The Tenth Circuit's assumption to the contrary again simply begs the question. The legislative history of the CWA expressly states that Congress intended "applicable" water quality standards only to mean those standards which regulate the types of pollutants that are constituents of the effluent from a particular discharger. H.R. Rep. No. 911, 92d Cong., 2d Sess. 121 (1972), *reprinted in* 1 Leg. Hist. of 1972, at 753, 808.

water quality disputes, which gives EPA and the source state the discretion necessary to impose more stringent effluent limitations when required to adequately protect downstream water quality:

> The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution.

479 U.S. at 497.

As this Court further recognized, sections 402(b) and 401(a)(2) of the CWA make "it clear that affected States occupy a subordinate position to source States in the federal regulatory program." *Id.* at 491. A downstream state's water quality standards, while relevant, are not binding and may in EPA's discretion be applied or moderated as necessary to serve the overall public interest:

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source . . . . Even though it may be harmed by the discharges, an affected State only has an *advisory role* in regulating pollution that originates beyond its borders. . . . [A]n affected state does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the *discretion* to disapprove the permit if he concludes that the discharges will have an *undue impact* on interstate waters.

Id. at 490-91 (emphasis added).[18] Until the decision below, all other federal and state appellate courts have uniformly adopted this same construction of the relevant provisions in the CWA.[19]

[18] The Tenth Circuit attempted to avoid this Court's construction of the relevant provisions of the Clean Water Act in *Ouellette* by characterizing it as dictum. Ark. P.A. at 26a. This depreciation of the Supreme Court's decision is not only dangerous, but wrong. This Court's construction of sections 402(b) and 401(a)(2) were an integral and essential part of its holding that these provisions conflicted with, and hence preempted, the application of the common law of a downstream state against a facility in an upstream state. Ark. Reply Br. at 5.

[19] *See, e.g., Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (downstream state's common law and water quality standards do not apply to out-of-state source); *National Wildlife Fed'n* v. *FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990); *State* v. *Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986), *cert. granted and remanded*, 479 U.S. 1061 (1987) (same).

2. The Act's Legislative History Further Confirms That Congress Did Not Intend To Make Downstream State Standards Binding On Out-Of-State Sources.

The legislative history of the Clean Water Act further demonstrates Congress' specific intent that EPA and state permitting agencies have discretion to determine on a case-by-case basis whether the water quality and standards of a downstream state warrant imposing additional permit conditions.

First, while Congress saw relatively little need in 1972 to amplify the clear meaning of sections 402(b)(5) and 402(a)(3), every explanation it did provide mirrored the statutory language requiring permit agencies to consider—but not necessarily accept—an objection based on downstream state standards.[20] Similarly, Congress consistently chose permissive language—such as "may then object" or "can veto"—to describe EPA's role in reviewing a state permit that does not require compliance

[20] *See, e.g.*, S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 139 (1972), *reprinted in* 1 Leg. Hist. of 1972, at 281, 322; 118 Cong. Rec. 10,219 (Mar. 27, 1972) (statement of Rep. Terry), *reprinted in* 1 Leg. Hist. of 1972, at 388-89.

with downstream state standards.[21] Indeed, Congress even added a provision that expressly allows EPA to waive its right to review and object to such a permit. CWA § 402(d)(3).

The language Congress used to explain the standard for EPA's exercise of its veto power also conveys Congress' intent that, far from expecting EPA to slavishly follow downstream state standards, EPA should make its own evaluation of whether the permitting state acted reasonably in deciding not to condition a permit on compliance with the downstream standards. For example, Congress explained that the Act authorizes (but does not require) EPA to veto a permit that would result in "unacceptable effects" on the waters of a downstream state or when the complaint of the downstream state is "reasonable." [22] This guidance confirms that Congress granted state permitting agencies and EPA broad discretion to weigh all factors, and consider all interests, in deciding whether to approve a permit with interstate effects. Significantly, nowhere did Congress state, either in connection with these provisions or the other 1972 amendments, that it intended to make downstream state standards applicable directly or to require strict compliance with such standards.

Second, the legislative history demonstrates that Congress intended to satisfy potential downstream state concerns by enacting an alternative approach. In particular, Congress attempted to prevent interstate disputes from arising in the first place by requiring EPA to review state water quality standards and ensure that they meet federal minimum requirements. CWA § 303(c). In other words, to improve the quality of interstate waterways and protect the interests of downstream states, Congress

[21] *See, e.g.*, 118 Cong. Rec. 33,761 (Oct. 4, 1972) (statement of Rep. Wright), *reprinted in* 1 Leg. Hist. of 1972, at 262; 118 Cong. Rec. 10,663 (Mar. 28, 1972) (statement of Rep. Terry), *reprinted in* 1 Leg. Hist. of 1972, at 581.

[22] *Id.* at 262, 581.

focussed primarily on forcing source states to adopt adequate standards. Thus, Congess specifically intended to address downstream state concerns by a fundamentally different approach than allowing downstream states to impose their standards extra-territorially on sources in upstream states.

Congress had originally sought to implement this approach in 1965, when it first required states to adopt ambient water quality standards for "interstate" waterways, which Congress thought were most likely to create tensions between the states.[23] In 1972, Congress substantially strengthened this requirement and reinforced its selection of this alternative approach. Under the new section 303, Congress bolstered EPA's authority to review state standards and even authorized EPA to promulgate federal standards if a state failed to adopt adequate measures. CWA § 303. Reflecting the same intent, section 103(a) of the rewritten Act specifically directs EPA to encourage interstate cooperation and the enactment of "uniform State laws relating to the prevention, reduction, and elimination of pollution."

As a result, Congress expected that the federal approval process for state standards would "insure uniform water quality standards across the Nation" and prevent states from creating pollution havens that may impair the water quality of downstream states.[24] Since an upstream state must adopt and enforce EPA-approved standards that will adequately protect water

[23] Even in 1965, Congress explained that the purpose of requiring states to adopt standards on interstate waterways was "to ensure that one State will not be polluting waters which also belong to others." 111 Cong. Rec. 8677 (1965) (statement of Rep. Dwyer). The concern for protecting downstream states from out-of-state discharges was also the primary motivation for Congress' decision to require federal approval of state standards. *See, e.g.*, 111 Cong. Rec. 8671 (1965) (statement of Rep. Ottinger); *id.* at 8678 (statement of Rep. Dwyer).

[24] 118 Cong. Rec. 10,795 (Mar. 29, 1972) (statement of Rep. Robison), *reprinted in* 1 Leg. Hist. of 1972, at 727.

quality, the likelihood that a discharge in an upstream state would cause an unacceptable impairment of a downstream state's water quality is greatly diminished. Congress therefore intended to deal directly with the possibility of insufficient upstream state standards, rather than make downstream state standards applicable to upstream sources through the permit process, as the Tenth Circuit surmised.

A third aspect of the legislative history that demonstrates Congress' intent arose in connection with the legislative review and reauthorization of the Clean Water Act in 1987. During the 1987 reauthorization, Congress considered two proposed amendments that were directly relevant to the issue of the extra-territorial application of downstream state standards. The first was a proposal in the Senate to restrict EPA's discretion by *requiring* the Agency to veto any permit that would cause a "substantial" downstream water quality violation.[25] In describing the Senate provision, the Conference Committee explained the difference between the existing law and the proposed amendment:

> Under current law, a State whose waters may be affected by the issuance of a permit in another State may submit recommendations to the permitting State. If those recommendations are not accepted by the

[25] S. 1128, 99th Cong., 1st Sess. § 117 (1985), *reprinted in* 2 Senate Comm. on Env't & Pub. Works, 100th Cong., 2d Sess., Legislative History of the Water Quality Act of 1987, at 1546, 1603 (1988) (hereinafter Leg. Hist. of 1987). In requiring EPA to veto only those permits that would result in "substantial" violations of downstream standards, the proponents of stricter compliance with such standards recognized the potential for abuse inherent in a scheme that required unbending compliance with downstream standards. The Senate Report accompanying the bill including this amendment stated that the requirement that downstream violations be substantial "assures that these provisions are not used by downstream States in an attempt to alter the water quality standards of upstream States in the absence of a significant pollution problem emanating from upstream States." S. Rep. No. 50, 99th Cong., 1st Sess. 49 (1985), *reprinted in* 2 Leg. Hist. of 1987, at 1420, 1470.

> permitting State, the Administrator *may* object to the issuance of the permit.
>
> The Senate bill requires the Administrator to decide the merits of such a dispute. Where the permitting State fails to accept the recommendations of the downstream State, the Administrator *shall* determine whether any substantial violation of a water quality requirement (including any standard) or adverse effect on the public health of the downstream State would result from the issuance of the permit. If so, the Administrator *must* object to the issuance of the permit or provide specific modifications to the permit.[26]

Thus, the Senate amendment would have changed EPA's veto authority from a discretionary function to a mandatory duty, albeit only for "substantial" downstream violations. The Senate amendment was not accepted by the House, however, and it was rejected in Conference, thereby preserving the "current law" that gives EPA discretionary authority.

The other relevant amendment that Congress considered in 1987, and did adopt, authorized EPA to treat Indian tribes as states under the Clean Water Act.[27] Several Congressmen expressed concern that such an amendment would cause intolerable confusion and uncertainty if the Act were interpreted to require sources in one "state" to comply with the standards of downstream "states."[28] Since Indian tribes would now be treated as "states" under the amendment, the number of jurisdictions that would be able to impose their standards on a particular facility under this construction of the Act would increase dramatically.

[26] H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 177 (1986), *reprinted in* 2 Leg. Hist. of 1987, at 690, 866 (emphasis added).

[27] Pub. L. No. 100-4, § 506, 101 Stat. 77 (1987) (enacting CWA § 518).

[28] *See, e.g.*, 133 Cong. Rec. 999 (Jan. 8, 1987) (statement of Sen. Hatch), *reprinted in* 1 Leg. Hist. of 1987, at 496; 133 Cong. Rec. 1589 (Jan. 21, 1987) (statement of Rep. Morrison), *reprinted in* 1 Leg. Hist. of 1987, at 550.

In the floor debates addressing this amendment, both the House and Senate proponents of the bill relied extensively on a memorandum reassuring members of Congress that neither the existing Act nor the 1987 Amendments required out-of-state sources to comply with the standards of downstream states:

> Where two or more states, sharing a common water body, have plans approved by EPA with differing standards of water quality, the Act does provide mechanisms for resolving inter-state conflicts. However, there is nothing in the existing Act or in the proposed amendments which gives EPA the power to force one state to changes [sic] its approved water quality standards or those valid activities done in accordance with its plan in order to accommodate the water quality needs of another state or states.[29]

Congress accordingly reauthorized and amended the Clean Water Act in 1987 with the express understanding that a downstream state cannot impose its standards on an out-of-state source.[30]

3. Making A Downstream State's Standards Applicable To Upstream State Sources Would Disrupt The Statutory Scheme And Congress' Careful Balance Among State Interests.

The Tenth Circuit's interpretation of the Clean Water Act conflicts, as shown above, with both the express

[29] 133 Cong. Rec. 1000 (Jan. 8, 1987) (memorandum to Rep. Udall), *reprinted in* 1 Leg. Hist. of 1987, at 551; 133 Cong. Rec. 1282 (Jan. 14, 1987) (memorandum to Rep. Udall), *reprinted in* 1 Leg. Hist. of 1987, at 395.

[30] Congress had already decided to adopt the amendment treating Indian tribes as states, and to reject the proposed amendment that would require EPA to veto permits that substantially impair the waters of a downstream state, when the *Ouellette* decision was announced. The 1987 Amendments were still pending, however, because President Reagan had vetoed the Water Quality Act of 1987 in late January of 1987. Following this Court's decision, both houses of Congress voted to override the President's veto in February 1987, *see* 1 Leg. Hist. of 1987, at 359, 313, 341, and Congress expressed no concern at that time about the *Ouellette* decision or indicated any inclination to alter the result reached by this Court.

language in the controlling statutory provisions and Congress' unambiguous expression of its intent in the legislative history. It also conflicts with the delicate balance Congress created in the overall statutory structure among the responsibilities of source states, downstream states, and EPA. As shown below, the Tenth Circuit's decision to give downstream state standards extra-territorial applicability cannot be reconciled with the balance struck by Congress, and, in fact, threatens to render the statutory scheme unworkable.

As one cornerstone of the 1972 Amendments, Congress assigned primary responsibility to the individual states for implementing the Act's programs. In so doing, Congress preserved the sovereignty of each state to adopt and enforce the regulations for sources and waters within its own borders. *See, e.g.*, CWA § 101(b) (the Act preserves the "primary responsibilities and rights of States"). Although Congress circumscribed the states' minimum authority to adopt standards lower than the requirements set by EPA, it recognized that some states might wish to adopt more stringent requirements for their own sources.

In deference to the principle of state sovereignty, therefore, Congress enacted a "savings clause" in section 510 that allows states to impose more demanding standards on their own industries and municipalities.[31] Moreover, as construed by EPA and reviewing courts, section 510 precludes EPA from disapproving the adoption of more stringent standards by a state, even if the Agency considers the state standards to be unnecessarily or unreasonably stringent. *See, e.g.*, 54 Fed. Reg. 39,099 (1989); *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979).

The sovereignty rationale underlying section 510 ends at the state line, however, and in no way suggests that one state's decision to adopt more stringent standards

[31] *See e.g.*, H. Rep. No. 911, 92d Cong., 2d Sess. (1972), *reprinted in* 1 Leg. Hist. of 1972, at 753, 823.

should be binding on sources in *other* states.[32] Indeed, according to its own terms, section 510 limits the application of stricter standards adopted under this section to in-state sources, by explicitly protecting the right of each state to exercise exclusive jurisdiction over its own waters, except as expressly provided by the Act. CWA § 510(2).[33]

In light of this statutory language and purpose, this Court has consistently construed section 510 as authorizing a state to apply stricter standards only to in-state sources. In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), this Court explained that section 510 authorizes a state to "adopt more stringent limitations through state administrative processes [or through state common law] and apply them to *in-state* dischargers." *Id.* at 328 (emphasis added). Again in the *Ouellette* decision, this Court confirmed that a state's authority to regulate sources under section 510 is limited "to discharges flowing *directly* into a State's own waters, *i.e.*, discharges from within the State." 479 U.S. at 481 (emphasis in original).[34]

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[32] Interstate water quality disputes usually arise when a downstream state on an interstate waterway adopts a stricter water quality standard under section 510 that exceeds the federal minimum requirements. The Tenth Circuit's decision fails to recognize that there are federally-approved state standards for each state. CWA § 303. The issue before this Court is not *whether* to enforce a federally-approved standard, it is rather a question of *which one* of the federally-approved standards should control—that of the source state or that of the downstream state. Based on this Court's rationale in *Ouellette*, the standards of the source state should control when there are conflicting federally-approved state standards. *See* 479 U.S. at 491.

[33] Section 510(2) states that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

[34] Lower courts have consistently reached the same conclusion. *See, e.g., Illinois* v. *City of Milwaukee*, 731 F.2d 403, 413 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) ("In the light of the structure of [the CWA] . . . and in the light of the conflict and confusion which could result from any different construction, we conclude that [section 510] refers to the right of a state with respect to discharges within that state, and not to any right of a state to impose more stringent limitations upon discharges in another state.").

The Tenth Circuit's interpretation of the Act would simply nullify Congress' intent and this Court's prior construction of section 510. In the Tenth Circuit's view, EPA's approval of a section 510 standard justifies this extraordinary step, apparently on the theory that EPA approval transforms the state standard into federal law. Ark. P.A. at 13a, 14a & 14a n.5. But this theory ignores the fact that EPA approval of a section 510 standard is automatic; the Agency *cannot* disapprove a standard on the ground that it is too restrictive. *See supra* page 25. The court's theory also ignores EPA's longstanding judgment that despite federal approval, a state standard remains *state* law, rather than *federal* law.[35] The legislative history of the CWA similarly makes clear Congress' understanding that standards adopted under section 510 constitute state law and are not standards imposed under the Clean Water Act, much less federal standards.[36]

In addition to conflicting with section 510, the Tenth Circuit's decision would deprive source state agencies of the ability to administer the Act in the manner Congress intended. As this Court emphasized in *Ouellette*, Congress made each state accountable for setting its own standards based on local conditions, the impact of differ-

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[35] Memorandum: Revision of Water Quality Standards and Implementation Plans Under § 303 of the Federal Water Pollution Control (Feb. 3, 1975), *incorporated in* In Re Bethlehem Steel Corporation, EPA General Counsel Op. No. 58 (Mar. 29, 1977). Other grounds given by EPA's General Counsel for reaching this conclusion were that federally-approved water quality standards are not directly enforceable, and that EPA approval of state water quality standards did not involve notice and comment rulemaking.

[36] For example, the Conference Report for the 1972 CWA Amendments explains that section 510 "provides that States . . . retain the right to set more restrictive standards and limitations *than those imposed under this Act.*" S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972), *reprinted in* 1 Leg. Hist. of 1972, at 281, 331 (emphasis added).

ent alternatives on municipal treatment facilities and local industries, and a variety of other social and economic considerations. 479 U.S. at 494.[37] This system will not work if the standards set by one state apply automatically to sources in all upstream states. The state imposing its standards will have little incentive to consider the interests of the other states, and the source state's ability to have *all* the relevant factors considered in setting standards and issuing permits will be vitated.[38] At the same time, the potential for overlapping and conflicting standards will cause widespread confusion and uncertainty about the applicable requirements and the ability of thousands of facilities to obtain new or renewed permits.[39]

Finally, the Tenth Circuit's decision threatens to create an impasse between upstream and downstream states, at the same time it eliminates EPA's intended role as a mediator for interstate water quality disputes. Since permit agencies are rigidly bound under the Tenth Circuit's view to apply a downstream state's standards, those states would have an unfettered veto over the permits for new and existing facilities in upstream states. This power creates the distinct risk—which history shows has

[37] *See, e.g.*, 117 Cong. Rec. 38,805 (Nov. 2, 1971), *reprinted in* 2 Leg. Hist. of 1972, at 1272.

[38] "Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 92 (1984).

[39] One of the important goals of the CWA is to provide "clear and identifiable" standards that individual dischargers are required to meet. S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), *reprinted in* 2 Leg. Hist. at 1415, 1499. This Court previously recognized in *Ouellette* that "[a]pplication of an affected State's law to an out-of-state source . . . would undermine the important goals of efficiency and predictability in the permit system." 479 U.S. at 496. The tangled patchwork of inconsistent and overlapping downstream state standards resulting from the Tenth Circuit's interpretation would make it virtually impossible to predict the standard for a lawful discharge. "It is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure." *Id.* at 497.

been realized all too often—that some states may apply their law to discriminate against out-of-state facilities and unfairly advance their own economic interests.[40] But even under the best of circumstances, the Tenth Circuit's view would remove any incentive for downstream states to compromise their interests for the facilities and needs of another state. The downstream state interests would always control, and the only alternatives for source states would be to acquiesce or perhaps retaliate on rivers where they are downstream. Congress intended to prevent, not promote, this form of interstate warfare.

Congress further intended that if interstate disputes did arise, EPA would act as the mediator to *balance* the interests of both the upstream and downstream states.[41] By making downstream state standards automatically ap-

[40] Whether intentional or not, it would be very easy for a downstream state to selectively impose stricter standards on out-of-state sources under the court of appeals' decision. For example, the downstream state could simply set very stringent standards for the segment of a stream as it first enters that state, and then impose much more lenient standards for downstream segments into which the state's own sources discharge. Under such an arrangement, only sources in the upstream state would be required to meet the stricter standards, putting these upstream sources at a competitive disadvantage relative to similar sources in the downstream state. Indeed, in the present case, Oklahoma has set a very stringent standard for the segment of the Illinois River just inside its border with Arkansas, but has established a much more lenient standard further downstream on the same waterway, where most Oklahoma dischargers are located.

[41] The need for a federal mediator to resolve interstate water quality disputes has long been recognized by this Court. When the prolonged water quality dispute between the State of Illinois and the City of Milwaukee first came before this Court in 1972, the Court made federal courts the mediator in interstate water quality disputes through their application of federal common law. *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 107 (1972). When the same dispute reappeared a decade later, the Court found that Congress had intended for EPA to replace the federal courts as the federal mediator when it enacted the 1972 CWA Amendments. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 326 (1981).

plicable, with no room left for deviation or federal interpretation, the Tenth Circuit's decision would nullify this federal intermediary role and disrupt the federal-state partnership established by Congress.[42] As shown above, the CWA attempts to prevent unjust and unreasonable consequences by giving EPA the discretion to balance the competing interests on a case-by-case basis and to impose additional effluent restrictions on upstream sources when necessary to protect downstream water quality. The Tenth Circuit's construction of the Act would destroy any basis for compromise between states and then leave the affected parties with no mediator having the power to strike a balance.[43]

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[42] *See, e.g.*, 118 Cong. Rec. 10,234 (Mar. 27, 1972) (statement of Rep. Roe), *reprinted in* 1 Leg. Hist. of 1972, at 426. The Solicitor General has previously emphasized the importance of Congress' careful allocation of state and federal responsibilities under the Clean Water Act. In its brief as amicus curiae opposing certiorari in *Scott* v. *City of Hammond, the United States* therefore explained that allowing a downstream state to regulate an out-of-state source would disrupt the delicate balance established by the Clean Water Act:

> The CWA creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. . . . Under this partnership, the states must defer to the federal government's choice of minimum national requirements but they reserve the unqualified power to determine to what degree they wish to impose more stringent pollution limitations within their borders. If . . . one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed. Where several states are situated on a particular body of water the state that has the most stringent limitations will displace the federal government as the arbiter of minimum pollution control requirements; this result is clearly contrary to the "full purposes and objectives of Congress."

Brief for the United States as Amicus Curiae at 10, *Scott* v. *City of Hammond, cert. denied*, 469 U.S. 1196 (1985) (No. 84-21) (citations omitted).

[43] As the United States' petition for certiorari here explained, the Tenth Circuit's decision has "undermined EPA's authority to implement the Clean Water Act by usurping EPA's role under the Act as the arbiter of interstate water pollution disputes." EPA Pet. at 13.

In light of the extraordinary constitutional implications of allowing one state to regulate conduct in another,[44] a reviewing court should be very reluctant to interpret a statute as having that effect absent an unequivocal mandate from Congress to do so. This Court has held in an analogous context that an "unmistakably clear" authorization from Congress is needed before one state can regulate entities in another state. *See, e.g., South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 91-92 (1984). Here, there is no expression of any Congressional intent, much less a clear expression, that downstream states should be allowed through the NPDES permitting process to apply their water quality standards to an out-of-state source. In fact, the plain language, legislative history, and statutory structure all show the contrary, and if there were any doubt whatsoever about Congress' intent, the statute should not have been given the far-reaching interpretation adopted by the Tenth Circuit.

B. EPA Properly Exercised Its Discretion Under The Clean Water Act In This Case And Decided Not To Impose Additional Restrictions On The Fayetteville Discharge.

EPA did even more than the statute requires in this case, and the Tenth Circuit's rationale for overturning the Agency's permit decision rests on a mistaken interpretation of the law and EPA's obligations. As shown above, the Oklahoma water quality standards are not directly applicable to a facility in Arkansas, and EPA was not required to assure that the Fayetteville discharge would comply with those standards. Instead, EPA was required to *consider* those standards and the impact of the discharge on downstream water quality, and to then make a case-

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[44] It is a well-established principle that one state cannot extend its regulatory authority into another state. As this Court explained long ago in *Kansas* v. *Colorado*, 206 U.S. 46 (1907), "no state can legislate for, or impose its own policy upon the other. . . . One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state . . . can impose its own legislation on no one of the others." *Id.* at 95-98.

specific determination whether additional limitations on the Fayetteville discharge were appropriate in light of all the circumstances.

Before making its decision to approve the permit, EPA was fully aware of Oklahoma's views and interpretation of the relevant water quality standards. Despite those views, and regardless of whether Oklahoma's interpretation of the standards was correct, EPA found that no additional limitations were needed to protect Oklahoma water quality. Specifically, after evaluating Fayetteville's permit application, the EPA Administrator made an initial threshold determination that the Fayetteville facility would have no adverse impact on the water of Oklahoma. *See* Ark. P.A. at 100a.[45] EPA nevertheless granted Oklahoma a discretionary evidentiary hearing to challenge that finding and EPA's consideration of the Oklahoma water quality standards. *See* Ark. P.A. at 96a. Following that evidentiary hearing, the ALJ and CJO upheld the Agency's decision to approve the permit, based on the finding that the Fayetteville discharge would have no adverse effect on Oklahoma water quality. *See* Ark. P.A. at 151a; *supra* pages 5-7.

None of the "errors" identified by the Tenth Circuit provide a legal basis for upsetting this exercise of the agency's discretion. For even if EPA did "misinterpret" the Oklahoma standards—a point addressed below—these standards were not legally binding, and the discretion to require compliance necessarily subsumes the discretion to interpret. Moreover, EPA's finding that the Fayetteville discharge would have *no detectable impact* on Oklahoma water quality does not in any way depend upon

[45] As a result, the notice and hearing provisions of section 401(a)(2) were not triggered. The statute provides that the 401(a)(2) requirements are only triggered by a threshold finding that the water quality of a downstream state will be adversely "affected" by a proposed discharge in an upstream state. *See supra* page 15. Both the ALJ and the CJO upheld the Administrator's determination that the 401(a)(2) procedures were not triggered in this case. Ark. P.A. at 100a, 109a n.3.

the interpretation of the Oklahoma standards here. Ark. P.A. at 151a. Under these circumstances, EPA's decision not to impose additional limitations on the discharge had to be a proper exercise of its discretion.

II. EVEN IF THE STANDARDS OF A DOWNSTREAM STATE WERE APPLICABLE TO A FACILITY IN AN UPSTREAM STATE, THE FAYETTEVILLE DISCHARGE COMPLIES WITH THE RELEVANT OKLAHOMA STANDARDS.

The Tenth Circuit's decision must also be reversed even if the Clean Water Act were somehow interpreted as making downstream state standards legally "applicable" to upstream sources. For even though it was not required to do so, EPA did thoroughly consider the Oklahoma water quality standards here before granting the permit, and the Agency made detailed findings that the Fayetteville discharge would not violate those standards.

While the Tenth Circuit may have reached a different conclusion if it were the initial decisionmaker, the Clean Water Act and the findings made by EPA still require that the Agency's decision be upheld on *each* of the following three grounds: (A) EPA properly found that the Fayetteville discharge would "comply" with the Oklahoma standards, as a matter of federal law, because the discharge would not cause any "actual detectable" violation of those standards; (B) Congress affirmatively gave EPA the discretion to interpret downstream state standards when making permit decisions, and the Tenth Circuit's reversal expressly rested on a refusal to afford the agency that deference; and (C) even if the court's preferred interpretation of the Oklahoma standards were correct, the specific 'errors" cited by the Tenth Circuit were harmless, given the Agency's factual findings. The Tenth Circuit therefore lacked any basis for overturning the permit or even remanding the case to EPA.

A. The Clean Water Act Allows EPA To Conclude That Sources Having No Detectable Impact On Water Quality Would Comply With Downstream Standards.

EPA's Chief Judicial Officer, acting on behalf of the Administrator, held here that the Fayetteville facility would comply with the downstream Oklahoma standards absent evidence that the discharge would cause "an actual *detectable* violation" of Oklahoma's standards. Ark. P.A. at 117a. A minor transgression of the downstream state's standards "predicted through modeling but not expected to be actually detectable or measurable . . . should not by itself block the issuance of the permit." *Id.* In adopting this interpretation of the word "comply" the CJO also recognized that "[t]he element of detectability is implied in EPA's regulations." *Id.* n.16.[46]

The Tenth Circuit provided no reason or explanation for rejecting EPA's construction of the CWA as providing a "detectability" threshold for evaluating compliance with a downstream state's water quality standards. The court of appeals did not disturb EPA's finding that the Fayetteville discharge will have no detectable effect on Oklahoma water quality. Ark. P.A. at 78a. But by overturning EPA's decision to approve the permit, the court must either have ignored or rejected the Agency's interpretation of the CWA regarding the significance of detectability.[47]

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[46] *See also* EPA Pet. at 24-25 ("At least where the effects of a discharge are undetectable at the State boundary, the receiving State can have little more than a theoretical basis for concluding that its water has been degraded. In such circumstances, it is at least reasonable for the responsible agency to conclude that the balance of equities favor permitting the discharge and that the discharge is not prohibited.").

[47] Somewhat inconsistently with this result, the court did agree at one point in its opinion that "[t]he ability, as well as the authority, to require compliance with the WQS of downstream states is necessarily limited by the ability to measure a source's impact on the water quality of the receiving waters." Ark. P.A. at 24a.

EPA's construction of the Act in this regard must be permissible. Nothing in the Act requires a different interpretation of compliance or precludes tying that term to detectability on a case-by-case basis. Indeed, EPA's conclusion is strongly *supported* by the provisions of the CWA that directly address the interstate application of water quality standards. For example, the requirements of section 401(a)(2) to notify a downstream state and consider that state's standards are only triggered by a threshold finding that the proposed discharge "may *affect*, as determined by the Administrator, the quality of the waters of any other State." CWA § 401(a)(2) (emphasis added).[48] It is entirely reasonable, therefore, for EPA to conclude that a discharge having no measurable or detectable impact on a downstream state's water quality will not "affect" such waterways.

EPA properly applied this interpretation of the CWA in the instant case and made the requisite factual finding of "no effect" under section 401. As stated by the ALJ:

> It should be noted that the requirements for public hearing under Section 401 are only triggered if the Administrator or the issuing Agency determines that the discharge will have an adverse impact on the waters of the receiving state. In this instance the Administrator, after evaluating the record, determined that no such impact would exist and therefore notification of the State of Oklahoma was not given and no public hearing under Section 401, as just described was ever held.

Ark. P.A. at 100a.[49] The CJO subsequently upheld the Administrator's threshold determination, that the section

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[48] Similarly, section 402(b)(5) also requires a threshold finding by the permitting agency that a downstream state's water quality "may be affected" in order to trigger the requirements of that provision.

[49] Oklahoma was given a second opportunity to challenge EPA's finding that the Fayetteville discharge would comply with Oklahoma water quality standards at an evidentiary hearing before the ALJ. Based on all the evidence, the ALJ still found that Fayetteville's discharge would have no detectable impact on the downstream state's waters. Ark. P.A. at 127a-143a.

401 requirements were not triggered because the Fayetteville discharge would not "affect" the water quality of Oklahoma, and the CJO also adopted the detectability test for compliance described above. *See* Ark. P.A. at 109a n3, 117a & n.16.

The element of "detectability" is an essential prerequisite of any duty to comply with the water quality standards of a downstream state. As the CJO concluded: "Clearly, unless there is some method for measuring compliance, there is no way to ensure compliance." Ark. P.A. at 118 n.16 (quoting *Champion International Corp.* v. *EPA*, 648 F. Supp. 1390, 1395 (W.D.N.C. 1986)). Indeed, without the detectability threshold implicit in the CWA and EPA's regulations, there often would be no way of determining compliance and the Agency's task would be impossible.

In sum, even if the Act were read as requiring upstream sources to "comply" with downstream state standards, as the Tenth Circuit erroneously did here, EPA must have the discretion to define the meaning of "comply." The Tenth Circuit gave no reason for rejecting EPA's construction of the Act and the Agency's regulations on this point, and EPA's conclusion about the meaning of "comply" must be upheld as a matter of federal law, as well as the Agency's application of that test in this case.

B. The Court Of Appeals Should Have Deferred To EPA's Interpretation Of The Oklahoma Water Quality Standards.

The Tenth Circuit also erred by refusing to defer to EPA's construction and application of the Oklahoma standards. Settled principles of judicial review and Congress' specific delegation of responsibility here to EPA both required the court to respect the Agency's interpretation absent a showing that EPA's view was clearly erroneous. Consequently, the Tenth Circuit's decision must be reversed, and the Agency's permit decision upheld, on this ground as well.

Based on its own interpretation of the Oklahoma standards and evaluation of the factual record, the Tenth Circuit concluded here that EPA had incorrectly construed and applied the Oklahoma water quality standards. Ark. P.A. at 53a. In substituting its interpretation of the Oklahoma standards for that of the expert agency responsible for administrating the statute—and even expressly declining to afford EPA any deference—the court of appeals exceeded the proper scope of judicial review.

This Court has long held that a reviewing court must defer to an agency's reasonable interpretation of its own administrative regulations. *See, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."). *See also Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988). The Clean Water Act also requires deference to EPA's interpretation of state standards, at least in the interstate context, because EPA itself is responsible for setting the federal minimum requirements. Moreover, Congress gave EPA the task of reviewing and approving all such standards for consistency with such requirements. This deference is particularly appropriate where the relevant state standards are based on EPA's own model standards,[50] and EPA is acting as the permitting agency.

To the extent that Congress directed EPA to consider or apply the standards of downstream states in permit decisions, Congress must also have delegated to EPA the authority to interpret these standards.[51] Instead of de-

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[50] As EPA explained in its petition for certiorari, "[i]n determining whether a proposed standard meets the statutory requirement, it is, of course, necessary for EPA to determine the meaning of that standard. Therefore, if a dispute concerning the meaning of the standard subsequently arises in the context of a permitting decision, EPA's interpretation of the disputed provision, which will reflect its understanding of that provision when approval to implement it was granted, should normally be dispositive."

[51] For example, when EPA is the permitting authority, section 401(a)(2) authorizes EPA, not the downstream state, to hold a

ferring to EPA's reasonable interpretation of the Oklahoma water quality standards, the court of appeals rejected EPA's construction and application of the Oklahoma standards in favor of its own interpretation. In so doing, the court plainly exceeded the appropriate role for a reviewing court.

C. The Specific "Errors" Identified By The Tenth Circuit Were Harmless And Do Not Affect The Validity of EPA's Decision.

A final reason that EPA's permit decision must be upheld—even if the Oklahoma standards were applicable and were misinterpreted by EPA—is that the specific "errors" found by the Tenth Circuit were plainly harmless. Given the specific findings of fact made by the ALJ with respect to each of the standards raised by Oklahoma, the errors could not affect the substance or outcome of EPA's decision.[52]

The first error identified by the Tenth Circuit is that the ALJ appeared to believe the Oklahoma nutrients standards applied only to lakes and not to streams. Ark. P.A. at 45a-46a. But even if the ALJ did err in construing the nutrients standard, the error was clearly harmless. The water segment where there was the greatest risk of Fayetteville causing a noncompliance with the

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hearing and make a determination about whether additional conditions should be imposed in light of a downstream state's water quality standards. In contrast, section 401(a)(1) gives the *source state* final interpretive authority through the certification procedure to determine whether a federally-issued permit will comply with its standards. Thus, section 401 expressly allocates the interpretive authority to source states when standards are applied intrastate, but assigns the authority to EPA to construe and apply standards in the interstate context.

[52] In light of its subsequent holding that the CWA required a permit ban upstream from existing water quality violations, *see infra* p. 42, the court of appeals did not decide whether the "errors" committed by EPA were serious enough to warrant remand to the Agency. *See* Ark. P.A. at 53a. As shown below, they plainly were not.

Oklahoma nutrients standard was Lake Francis.[53] The water in Lake Francis is shallow and slow moving, and therefore presents the greatest danger of accumulated concentrations of nutrients. Yet the ALJ found, and the court did not question this finding, that the Fayetteville discharge would *not* cause a violation of the Oklahoma nutrients standard in Lake Francis.[54] A fortiori, the same discharge could not cause a violation of the nutrients standard in the more rapidly flowing segments of the Illinois River downstream from Lake Francis and the asserted misinterpretation was plainly inconsequential.[55]

Next, the court found that the ALJ erred by applying the 1985, rather than the 1982, Oklahoma water quality standards. Ark. P.A. at 52a. EPA's Chief Judicial Officer specifically considered this error and explained that it was harmless, because there are no material differences between the 1982 and 1985 Oklahoma standards that are relevant to this case. Ark. P.A. at 149a-150a. The court of appeals barely mentioned this explanation by the CJO, much less gave a sufficient reason for rejecting it, since the court itself did not identify any difference between the two sets of standards that could have changed the result reached by EPA. Indeed, the Arkansas parties contended in the proceedings below that if EPA applied any Oklahoma standards, it should apply the 1982 standards, in part because they were easier to satisfy than the 1985 standards. *See* Ark. P.A. at 123a. There-

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[53] *See, e.g.*, Ark. P.A. at 57a-60a (focus of most of the concern and testimony at the evidentiary hearing was the water quality problems of Lake Francis).

[54] Ark. P.A. at 127a-132a.

[55] Lake Francis is an artificial lake formed by a dam on the Illinois River just inside the Oklahoma/Arkansas border. Thus, it is the segment of the Illinois River in Oklahoma closest to the Fayetteville discharge and would be expected to receive the highest nutrient concentrations. Moreover, nutrients tend to accumulate to a much greater extent in a shallow sedentary lake than in a flowing river.

fore, the CJO correctly concluded that since the ALJ found the Fayetteville discharge would comply with the stricter 1985 standards, that finding also supported his own conclusion that the discharge would comply with the similar, but slightly less stringent, 1982 standards.

Finally, the court suggested that EPA erred by placing the burden of proof on Oklahoma to show why the permit should not be issued, rather than on the Agency and the permit applicant to demonstrate that the proposed discharge would comply with all applicable requirements under the CWA. Ark. P.A. 52a-53a. This "error" is based on a misinterpretation of the ALJ's decision, since the ALJ in fact placed the burden on the permit applicant[56] and Fayetteville met that burden in this case.[57] EPA had originally issued the permit, following a hearing and written comments on the draft permit, based on its finding that the proposed discharge would comply with all applicable requirements. When Oklahoma challenged the final permit at the evidentiary hearing granted by EPA, the Agency and the permit applicant again met their burden of coming forward with an affirmative case to support the final permit. *See* 40 C.F.R. § 124.85(a)(2). At this point, the Oklahoma parties, who were challenging the permit, had the burden of coming forward to present an affirmative case with respect to the permit conditions they were challenging. *Id.* § 124.85(a)(3). It was this burden that the Oklahoma parties failed to meet,

[56] The ALJ clearly placed the burden of proof on the permit applicant: "Based on the voluminous administrative record . . . I am of the opinion that *the permit applicant has successfully borne the burden* of persuading the writer that the permit . . . should be issued and not denied and that the evidence put forth by the Oklahoma parties was not sufficiently strong to persuade this writer that the permit should be denied or otherwise be invalid." Ark. P.A. at 105a (emphasis added).

[57] The CJO, in upholding the ALJ's decision, determined that the ALJ had properly found that "the record shows by a preponderance of the evidence that the authorized discharges would not cause . . . [a] violation of Oklahoma's water quality standards." Ark. P.A. at 151a.

since the ALJ conducted a thorough review of the evidence for each parameter of Oklahoma water quality that could possibly be affected by the Fayetteville discharge, and he concluded that the evidence presented at the hearing demonstrated that the discharge would cause no violation of Oklahoma water quality standards.[58] Thus, EPA and the permit applicant did satisfy their burden of proof, and the court's conclusion that the agency erred in assigning the burden to Oklahoma was mistaken.[59]

Whether considered individually or collectively, none of the errors cited by the Tenth Circuit are of sufficient importance to call into question the Agency's conclusion that the Fayetteville discharge will fully comply with all Oklahoma water quality standards.[60] The court of appeals

[58] Ark. P.A. at 127a-143a.

[59] Moreover, when the disputed issue is whether an out-of-state facility will comply with the standards of a downstream state, the legislative history of the CWA clearly indicates that Congress intended to place the burden of proof on the downstream state to demonstrate that its waters would be unreasonably impaired by the out-of-state discharge. *See* 118 Cong. Rec. 33,712 (Oct. 4, 1972) (statement of Sen. Tunney), *reprinted in* 1 Leg. Hist. of 1972, at 209 (EPA can only veto a permit affecting a downstream state "where the Governor of a downstream State demonstrates that his waters are being polluted by permitted effluent discharges in another State"); 118 Cong. Rec. 33,752 (Oct. 4, 1972) (statement of Rep. Jones), *reprinted in* 1 Leg. Hist. of 1972, at 238 (same).

[60] The court of appeals also criticized some of the ALJ's factual findings on eutrophication. Ark. P.A. at 67a n.47, 74a. However, as EPA's certiorari petition stated, "the court took statements of the ALJ out of context, focused on the irrelevant, and materially misconceived what the ALJ did say." EPA Pet. at 19. The court of appeals' assessment of the facts relied almost exclusively on the prefiled testimony of the Oklahoma expert witnesses, but the court failed to recognize that virtually all of the testimony was retracted or substantially qualified during cross-examination at the evidentiary hearing. *See, e.g.*, Ark. P.A. at 103 (all Oklahoma expert witnesses admitted on cross-examination that any impact from the Fayetteville discharge would be non-detectable and only theoretical). The court's mistaken impression about the facts of this complex, technical case demonstrate the dangers of allowing a reviewing

lacked any legitimate ground for failing to defer to EPA's interpretation and application of the federally-approved Oklahoma standards, or for disturbing the Agency's findings that the Fayetteville discharge will fully comply with the Oklahoma standards.

III. THE CLEAN WATER ACT DOES NOT REQUIRE A BAN ON NEW PERMITS UPSTREAM FROM A PRE-EXISTING WATER QUALITY VIOLATION.

After identifying the errors discussed above, the court actually overturned EPA's permit decision based on an issue not even raised by Oklahoma. Specifically, in a second major holding, the court concluded that the Clean Water Act requires imposing a ban on new permits upstream from any segment of the waterway with pre-existing water quality violations. This harsh new rule would unfairly punish new permit applicants for the problems created by existing facilities and other sources of pollution, and was never intended by Congress. Instead, Congress intended a fundamentally different and more reasonable approach when it enacted the CWA. In particular, the 1972 CWA Amendments rejected a categorical ban on new sources in favor of giving state agencies flexibility to allocate the responsibility for reducing pollution levels fairly among the sources actually causing or contributing to existing water quality problems.

In contrast, the Tenth Circuit's extreme approach would impose a rigid ban on new facilities in many areas of the country. Moreover, because it only applies to new discharges, the Tenth Circuit's permit ban would discourage municipalities and industries from building new, modern facilities to replace old existing plants that are equipped with outdated pollution control technologies. The end result of the Tenth Circuit's holding will therefore be counterproductive to all the goals embodied in the Clean Water Act.

court to dabble in massive administrative records, especially those involving highly scientific matters. "[A] reviewing court must generally be at its most deferential" when reviewing scientific determinations, as opposed to simple findings of fact. *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983.

Although the Tenth Circuit's decision is ambiguous in many respects, the court clearly based its imposition of the permit ban upon an interpretation of the CWA and its view of the Act's purposes.[61] Thus, the court emphasized that "EPA's express power and obligations under the CWA necessarily subsume the power to prohibit any new discharge of pollution, regardless of the magnitude of its impact, where the existing quality of the receiving water do not meet required standards." Ark. P.A. at 81a-82a.[62] Even though the court could point to no specific statutory provisions supporting this construction of the Act, it nonetheless concluded that "Congress cannot reasonably be presumed to have intended" that new permits would be approved upstream from an existing violation. Ark. P.A. at 78a.[63]

[61] The court's permit ban holding is already being interpreted and applied by the U.S. Government in various permit proceedings as deriving from the CWA. *See* EPA, *In the Matter of: City of Waskom, Texas*, NPDES Appeal No. 90-18, at 6 (Jan. 28, 1991). *See also* Comment of U.S. Dept. of the Interior, Fish and Wildlife Service, on NPDES draft permit AK-004978-6, to U.S. EPA, Region 10 (Feb. 12, 1991) (interpreting Tenth Circuit's holding as requiring a ban on new permits upstream from an existing water quality violation in Alaska).

[62] *See also* Ark. P.A. at 83a ("Particularly in light of the existing pollution of the Illinois scenic river, the agency's decision is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, and frustrates the policy that Congress sought to implement.").

[63] An alternative reading of the Tenth Circuit's holding is that the Oklahoma antidegradation policy requires a ban on new permits upstream from an existing violation of the standard. However, the court of appeals' own interpretation of this Oklahoma standard in other parts of its opinion was clearly inconsistent with such a reading. *See* Ark. P.A. at 49a. Furthermore, the permit ban holding lacks any foundation in the Oklahoma antidegradation standard, because this standard does not in any way suggest or imply that it would apply differently, depending on whether or not there is an existing downstream violation of the standard. The standard only

Despite basing its permit ban holding on an interpretation of the goals and purposes of the CWA, the court admitted that there was no "*explicit* imprimatur" in the CWA for its holding. Ark. P.A. at 81a. Moreover, the court acknowledged that its approach was revolutionary, having never been suggested by any party in the briefs or oral argument, or indeed even hinted at in any of the dozens of CWA cases decided by federal courts. Ark. P.A. at 54a nn.39 & 40. The court nevertheless held that EPA's failure to consider the consequences of a pre-existing violation of Oklahoma's water quality standards was "the principal flaw in the agency's decision-making rationale" which required denial of the permit. Ark. P.A. at 75a.

In elaborating the terms of this new rule, the Tenth Circuit identified three findings that are needed to trigger the imposition of this permit ban on new sources. Ark. P.A. at 55a. First, there must be a pre-existing in-state or out-of-state violation of an applicable downstream water quality standard.[64] Second, some amount of a source's discharge, even if undetectable, must reach the downstream segment experiencing a water quality violation. *See* Ark. P.A. at 65a.[65] Finally, the existing downstream violation must have been "caused at least in part by pollutants that are constituents of [the source's] effluent." Ark. P.A. at 72a. Although EPA had made no

addresses the prospective impact of a proposed activity, and past degradation by other sources is not a relevant consideration in application of the standard to new sources.

[64] Of course, if as demonstrated above, the water quality standards of a downstream state do not automatically apply to an out-of-state source, then nonattainment of a downstream standard would only result in a permit ban within that downstream state.

[65] A new permit cannot be approved if "*any* amount of that effluent can reasonably be expected to reach the degraded waters." Ark. P.A. at 82a n.58 (emphasis added). In theory, under the Tenth Circuit's holding, a single molecule of effluent reaching the downstream segment would trigger the permit ban. It is hard to imagine how a permit applicant could prove that *none* of its effluent would reach the downstream segment.

findings on these newly-formulated conditions, the court made its own independent evaluation of the record and concluded that all three conditions were met and therefore the Fayetteville permit was prohibited as a matter of federal law. Ark. P.A. at 71a-72a.

The Tenth Circuit's imposition of a permit ban based on its own novel interpretation of the Clean Water Act clearly exceeds the appropriate role for a reviewing court under this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).[66] Under the initial step in the analysis mandated by *Chevron*, a reviewing court must look to see whether Congress has directly spoken to the precise question at issue. *Id.* In the event Congress has not spoken of its intent or a particular issue is ambiguous, *Chevron* then requires a reviewing court to defer to the agency's construction of the statute, rather than simply adopt its own. 467 U.S. at 842-43.

The Tenth Circuit's decision cannot be sustained under this analysis. Even the court below acknowledged that no provision in the Act expressly supported imposing this permit ban. Ark. P.A. at 81a. In fact, Congress clearly intended *not* to impose such a ban, as shown below. Moreover, the *court* certainly should not have undertaken the crafting and imposition of this ban in the first instance.

[66] The Tenth Circuit's permit ban is analogous to the construction ban required in nonattainment areas under the Clean Air Act. 42 U.S.C. § 7410(a)(2)(I) (1988). However, the construction ban required by the Clean Air Act was enacted by Congress, whereas the Tenth Circuit acted without Congressional authorization or support in imposing a construction ban for nonattainment areas under the CWA. Furthermore, the construction ban imposed under the CWA by the Tenth Circuit is much more extreme than the ban required by the Clean Air Act. Unlike the Clean Air Act, the Tenth Circuit's ban extends beyond the area of nonattainment to all upstream water segments, and does not contain an exception for new sources that "offset" new discharges with equivalent reductions from existing sources in the same area. *See* 42 U.S.C. § 7503 (1988).

As the agency responsible for administering the CWA, EPA has never suggested that an existing violation of water quality standards automatically requires an absolute ban on new permits, especially for discharges that will have no detectable effect on water quality.

The Tenth Circuit's holding is not only inconsistent with EPA's administration of the CWA, but it is also contradicted by several express provisions in the CWA, which the court of appeals completely overlooked, for dealing with ongoing violations of water quality standards. The statutory scheme created by Congress in the 1972 CWA amendments included two strategies intended to bring about improvements in water quality on the nation's many degraded waterways.[67] The first was to shift the focus of the Act from water quality standards to national technology-based effluent limitations that applied automatically to every point source.[68] Congress expected that water quality would improve steadily as effluent limitations based on best available technology become progressively more stringent over time.[69]

The second element of Congress' strategy attacked the problem of nonattainment with water quality standards

[67] At the time the NPDES permitting program was enacted in the 1972 CWA Amendments, many of the nation's waterways were severely polluted, yet Congress never suggested that this would require a ban on new permits for affected waterways. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1425.

[68] CWA § 301(b)(1). *See supra* note 9. Congress described the pre-1972 approach of controlling water pollution, which placed primary reliance on ambient water quality standards, as "inadequate in every vital respect." S. Rep. No. 414, 93d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1425.

[69] *See, e.g.*, S. Rep. No. 414, 92d Cong., 1st Sess. 42 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1460 ("the program established by this section requires increasingly tougher controls on industry . . . [I]ndustry will be required every five years to re-evaluate its control efforts and to apply the best technology then available . . . [and] industries will have to show every five years that no-discharge is not attainable.").

directly. Specifically, the Act requires state agencies to identify sources that are contributing to ongoing water quality violations, and to implement plans for reducing discharges from such sources to bring the affected waterways into compliance. The principle underlying this approach chosen by Congress was that the responsibility for improving water quality should be placed on those sources that are causing the problems, not on new sources that may be built later.

The key provision of this statutory scheme is section 303(d), which requires states to establish maximum daily loads necessary to bring waterways with existing water quality violations into compliance.[70] EPA's implementing regulations require the state to adopt a waste load allocation plan that distributes the allowable maximum daily load among all dischargers.[71] Whereas the Tenth Circuit's holding would require a categorical ban on new discharges, section 303(d) authorizes the state to allocate equitably the burden of reducing waste loads between new and existing sources. Thus, if the state has established a maximum daily load for a given waterway, new sources or increased discharges from existing sources would be permitted provided they are included in the waste load allocation plan.[72]

The approach adopted by Congress in section 303(d) is reinforced by section 208, which requires states to de-

[70] A maximum daily load is the total quantity of effluent that can be discharged into a waterway per day without exceeding the relevant water quality standards.

[71] 40 C.F.R. § 130.7. Section 303(d) does not require a state to establish immediately maximum daily loads for all waterways with existing water quality violations. Rather, the Act directs states to establish such plans incrementally according to the state's own priority ranking of its waterways, with no fixed deadline for completing the process for all waterways. CWA § 303(d)(1)(A).

[72] In this case, Oklahoma has not established a maximum daily load or waste load allocation plan for the Oklahoma segments of the Illinois River that are allegedly experiencing ongoing violations of Oklahoma water quality standards.

velop and implement "areawide waste treatment management plans" for regions experiencing "substantial water quality control problems." [73] Under this planning process, states must identify the causes of water quality violations, and allocate the responsibility for alleviating these problems. CWA § 208(b)(2). Section 208 directs states to consider all point and non-point sources of pollution in the planning process, and to include in their management plans the many different strategies and methods for controlling pollution that are expressly required by section 208(b)(2). Significantly, the extensive repertoire of specific control strategies required by Congress in this section *does not* include a ban on new sources.

In short, the CWA expressly provides a specific and comprehensive strategy for the improvement of water quality on polluted waterways.[74] The Tenth Circuit ignored these provisions, and instead created its own novel solution to address a problem that Congress had expressly dealt with by taking a very different approach. In so doing, the court adopted an approach that not only conflicts with the choices made by Congress, but also threatens to seriously disrupt the effort of EPA and the states to implement the programs intended by Congress to improve water quality. In particular, the Tenth Circuit's holding would force agencies to divert their focus from controlling existing sources that are the cause of ongoing water quality violations to prohibiting new sources regardless of whether they will contribute to or cause water quality violations.

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[73] When one or more states share a region or waterway with common water quality control problems, section 208 requires states to "consult and cooperate" in developing and implementing a joint management plan. CWA § 208(a)(3).

[74] Section 304(1) is yet another provision that addresses how to ameliorate ongoing water quality violations. This provision requires states to identify waterways with ongoing violations of water quality standards caused by toxic pollutants, and to impose "individual control strategies" on point sources that the state identifies as contributing to such violations.

Moreover, the shift in emphasis from imposing additional controls on existing sources to banning new sources altogether, regardless of their impact on water quality, will ultimately be counterproductive to Congress' goal of improving water quality. Since only new discharges are affected by the Tenth Circuit's ban, municipalities and businesses will be given an incentive to continue operating existing, often outmoded facilities, rather than building new, state-of-the-art plants that may be denied a permit under the court's holding. But because new facilities are required to incorporate the best and most recent technology for controlling pollution under section 306 of the Act, the replacement of aging facilities equipped with obsolete pollution control technologies would otherwise produce a net benefit for the environment.[75]

The Tenth Circuit's imposition of an absolute and immediate permit ban, based on its view of the best remedy to fulfill the Act's purposes, was thus manifestly inappropriate. Unless overturned, the Tenth Circuit's exercise in creative judicial lawmaking will block any new industrial or economic development in a substantial portion of the nation. Such an extreme result was never envisioned by Congress, and is totally unnecessary and even counterproductive. The Tenth Circuit's "principal" reason for overturning the Fayetteville permit therefore directly conflicts with the Clean Water Act and EPA's administration of the Act, and must be reversed.

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[75] Such is the case with the replacement of the old Fayetteville wastewater treatment plant by the construction of a new state-of-the-art facility. In addition to being counterproductive, the Tenth Circuit's holding would unfairly hold new permit applicants responsible for the problems created by existing facilities. Indeed, the Tenth Circuit admitted that it is "arguably unfair to 'punish' Fayetteville for pre-existing dischargers' past failure to comply with WQS." Ark. P.A. at 81a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the NPDES permit issued to Fayetteville should be upheld.

Respectfully submitted,

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May 31, 1991

(5) (10)

Nos. 90-1266 and 90-1262

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

STATE OF ARKANSAS, ET. AL., PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY

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QUESTIONS PRESENTED

1. Whether determination of the appropriate standards governing the issuance of permits under the Clean Water Act for discharges into interstate waters involves a question of federal law, requiring a reviewing court to uphold the validity of the Environmental Protection Agency's permitting action if that action was based upon a reasonable interpretation and application of the federally approved water quality standards of the receiving State.

2. Whether the Environmental Protection Agency reasonably concluded that the contemplated discharge would comply with the applicable water quality standards because it would have no detectable impact on current water quality within the receiving State.

3. Whether the court exceeded the proper scope of judicial review.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court of appeals, in addition to the United States Environmental Protection Agency, were the State of Arkansas, The Arkansas Department of Pollution Control and Ecology, The City of Fayetteville, Arkansas, the Beaver Water District, the State of Oklahoma, the Oklahoma Scenic Rivers Commission, The Oklahoma Pollution Control Coordinating Board, Save the Illinois River (STIR), and the Oklahoma Wildlife Federation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-97a)[1] is reported at 908 F.2d 595.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1990. Petitions for rehearing were denied on October 11, 1990 (Pet. App. 98a-99a). On December 29, 1990, Justice White extended the time for filing a petition for a

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[1] "Pet. App." refers to the petition appendix in No. 90-1266; "Ark. Pet. App." refers to the petition appendix in No. 90-1262.

writ of certiorari to and including February 8, 1991. The petitions were filed on that date, and granted on April 1, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(l).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, are reproduced at Pet. App. 100a-106a. The relevant provisions of the Oklahoma Water Quality Standards are reproduced at Pet. App. 96a-97a.

STATEMENT

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through reduction and eventual elimination of the discharge of pollutants into those waters. Section 101(a), 33 U.S.C. 1251(a). The Act anticipates a partnership between the federal government and the States to achieve this fundamental goal. The Administrator of the Environmental Protection Agency (EPA) is, with certain explicit exceptions not relevant here, responsible for administering the Act. Section 101(d), 33 U.S.C. 1251(d). A major responsibility of the Administrator under the Act is the development and promulgation of uniform national technology-based standards, known as "effluent limitations guidelines," for categories and classes of discharges. Sections 301 and 304, 33 U.S.C. 1311 and 1314. *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-136 (1977). An "effluent limitation" is "a[ ] restriction * * * on quantities, rates, and concentrations of chemical, physical, biological, and other

constituents which are discharged from point sources." Section 502(11), 33 U.S.C. 1362(11).[2]

A second major source of authority for reducing pollution is found in Section 303, which directs States, with federal approval and oversight, to institute a range of comprehensive requirements, potentially more stringent than the federally imposed limitations, to assure protection of the quality of all state waters. Section 303(a), (b), and (c)(1), 33 U.S.C. 1313(a), (b), and (c)(1). These water quality standards are not technology-based standards; instead, they are based on the desired uses and condition of the particular waterway involved. Congress utilized water quality standards "as a supplementary basis * * * so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976). Section 303(c)(2), 33 U.S.C. 1313(c)(2). A water quality standard is a method of expressing the desired condition of a waterway. Water quality standards under the Act generally consist of three elements: (1) one or more designated "uses" of that waterway (*e.g.*, public water supply, recreation, propagation of fish, or agriculture) consistent with the goals of the Act as set forth in Section 101; (2) "criteria" specifying the amount of various pollutants that may be present in those waters and still protect the designated uses, expressed in numerical concentration limits or narrative form; and (3) a provision restricting the degradation of certain waters, *i.e.*, an antidegradation policy. Section 303(c)(2), 33 U.S.C. 1313(c)(2); Section

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[2] A point source is "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." Section 502(14), 33 U.S.C. 1362(14).

303(d)(4)(B), 33 U.S.C. 1313(d)(4)(B); 40 C.F.R. Pt. 131, Subpt. B. The States must submit their water quality standards to EPA for review and approval. Upon approval by EPA, a state-adopted water quality standard "shall thereafter be the water quality standard for the applicable water of that State." Section 303(c)(3), 33 U.S.C. 1313(c)(3).

The primary means for achieving and enforcing effluent limitations guidelines and state water quality requirements is the "national pollutant discharge elimination system" (NPDES) permit program under Section 402 of the Act, 33 U.S.C. 1342. *State Water Resources Control Bd.*, 426 U.S. at 205. The Act prohibits the discharge of any pollutant[3] into the waters of the United States except when authorized by an NPDES permit or a Section 404 permit.[4] Section 301(a), 33 U.S.C. 1311(a). Thus, an NPDES permit (which may include a timetable for compliance) transforms generally applicable effluent limitations guidelines and state water quality standards into obligations of the individual discharger. See 40 C.F.R. 122.44(d)(1).

The Act provides that EPA will issue NPDES permits except in those States where EPA has approved a state permit program pursuant to Section 402(b), 33 U.S.C. 1342(b).[5] Even in those States with approved permit programs, the State must submit to EPA a copy of each proposed permit involving an interstate waterway before it may be issued.

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[3] The term "pollutant" is defined in Section 502(6) of the Act, 33 U.S.C. 1362(6).

[4] Section 404 permits authorize the discharge of "dredged or fill material," whereas NPDES permits authorize the discharge of all other pollutants. Section 404(a), 33 U.S.C. 1344(a). The permit at issue here is an NPDES permit.

[5] EPA had permit-issuing authority in this case, which involves discharges arising in Arkansas, because Arkansas did not have an approved permit program at the time the permit application was made. EPA has subsequently approved the Arkansas permit program.

Section 402(d)(1) and (2), 33 U.S.C. 1342(d)(1) and (2); 40 C.F.R. 123.24(d). EPA may object to issuance of an NPDES permit if it determines that issuance would be "outside the guidelines and requirements" of the Act. Section 402(d)(2)(B), 33 U.S.C. 1342(d)(2)(B). On receipt of an objection, the State may submit an appropriately revised permit; if it fails to do so, EPA will issue a permit "in accordance with the guidelines and requirements" of the Act. Section 402(d)(4), 33 U.S.C. 1342(d)(4).

The Clean Water Act also establishes mechanisms for resolving interstate water pollution questions, *i.e.*, situations where a discharge in one State may affect the waters of another State. Specifically, the statutory conditions for EPA approval of state permit programs require each program to contain specified provisions for dealing with such situations. The source, or permit-issuing, State must have procedures for notifying other States, "the waters of which may be affected," of a permit application contemplating such discharges. Section 402(b)(3), 33 U.S.C. 1342(b)(3). Each potentially affected State must then be afforded an opportunity to "submit written recommendations to the permitting State" and to EPA regarding the application. Section 402(b)(5), 33 U.S.C. 1342(b)(5). If any part of those recommendations is not accepted by the permitting State, that State must notify the affected State and EPA. Section 402(b)(5), 33 U.S.C. 1342(b)(5). EPA then has the right to object to issuance of the permit, as provided in Section 402(d)(2)(A), 33 U.S.C. 1342(d)(2)(A).

Where EPA itself retains permit-issuing authority, the statutory procedures for resolution of interstate disputes are contained in the provisions governing the issuance of federal licenses and permits that may affect water quality. Thus, Section 401(a), 33 U.S.C. 1341(a), requires applicants for federal licenses or permits for activities that may result in discharges to navigable waters to provide a certification

from the source State that the proposed discharge will comply, *inter alia*, with applicable water quality standards. If the source State denies such a certification, no permit may be issued. Section 401(a), 33 U.S.C. 1341(a). Whenever EPA (or any other federal permitting authority) determines that a discharge might affect water quality in another State, it must notify that State. Section 401(a)(2), 33 U.S.C. 1341(a)(2). If the notified State determines that the discharge will violate its water quality requirements, the federal permitting authority must (if the State requests) hold a hearing to consider the State's objections and EPA's recommendations, and "condition such * * * permit in such manner as may be necessary to insure compliance with applicable water quality requirements." Section 401(a), 33 U.S.C. 1341(a)(2).[6]

2. This case involves an interstate dispute concerning the waters of the Illinois River, which originates in the State of Arkansas and flows into the State of Oklahoma.[7] In the early 1980's the City of Fayetteville, Arkansas, operated a sewage treatment plant that discharged all of its wastewater into the White River (which is not a tributary of the Illinois River).[8] The White River was unable to assimilate that waste without violating Arkansas' water quality standards. To alleviate this situation, Fayetteville constructed a new wastewater treatment plant, with federal financial assistance provided by EPA under the Clean Water Act. The plant

[6] If EPA is itself the permitting agency, the hearing is held pursuant to the provisions of Section 402(a), 33 U.S.C. 1342(a).

[7] In 1970, Oklahoma designated the portion of the Illinois River from the state line to the Tenkiller Reservoir a state scenic river. Pet. App. 50a, 62a; Okla. Stat. Ann. tit. 82, § 1452(b)(1) (West 1990).

[8] The sewage treatment plants of other Arkansas communities have, however, historically discharged their effluent into the Illinois River above the state line. See Ark. Pet. App. 128a.

was designed so that its discharges into the White River would not cause a violation of Arkansas water quality standards: discharged pollutants were to be greatly reduced, and half of the treated effluent was to be discharged into a tributary of the Illinois River. Pet. App. 2a, 5a.[9]

In 1985, Fayetteville applied to EPA for an NPDES permit for its new treatment plant. Following public notice and an informal public hearing (see 40 C.F.R. Pt. 124), EPA issued an NPDES permit to Fayetteville on November 5, 1985, to become effective on December 10, 1985. The permit authorized split flow into both the White River and the Illinois River tributary; it contained stringent limits with respect to oxygen demand, total suspended solids, and phosphorus. It also prohibited discharge of inadequately treated sewage, so that if the plant malfunctioned, wastewater would have to be stored and retreated. Finally, a reopener provision in the permit specified that if an ongoing study of water quality in the Illinois River showed a need for more stringent limitations on Fayetteville's discharge to ensure compliance with Oklahoma water quality standards, the permit would be modified accordingly. Pet. App. 5a-6a.

Both Oklahoma and Arkansas requested an evidentiary hearing before EPA on its issuance of the NPDES permit. The sole issue addressed in the evidentiary hearing was whether the Fayetteville discharge into the tributary of the

[9] Fayetteville's plans prompted the State of Oklahoma to move this Court for leave to file an original action against the State of Arkansas (and other entities) alleging causes of action under the federal and state common law of nuisance. *Oklahoma* v. *Arkansas*, No. 93 Orig. In response to the Court's invitation, the United States filed a brief opposing the motion for leave to file the complaint, on the ground that the Clean Water Act permitting procedures would afford the State an adequate remedy for any threat to its water quality standards. This Court denied the motion for leave to file the complaint. 460 U.S. 1020 (1983).

Illinois River would cause a violation of the Oklahoma water quality standards (Oklahoma standards). Ark. Pet. App. 98a. The evidence at the hearing consisted largely of expert testimony discussing various mathematical models designed to predict the impact of the proposed flow on the waters of the Illinois River in Oklahoma. *Id.* at 99a. Reliance on this type of evidence was necessary not only because no actual effluent measurements were available (since the Fayetteville plant was not yet in operation), but also because the effluent was to be discharged at the Fayetteville plant, 39 miles upstream from the Oklahoma state line. It was therefore necessary to predict the changes the effluent would undergo while it was still in Arkansas—*e.g.*, changes resulting from the assimilation of nutrients by biota in the river, and from reoxygenation through aeration and turbulence. See Ark. Pet. App. 99a, 129a, 139a.

The relevant Oklahoma standards include numeric dissolved oxygen requirements, limitations on the concentrations of nutrients (phosphorous and nitrogen/phosphorous concentration ratio), and numeric limitations on inorganic elements and organic chemicals. Ark. Pet. App. 127a, 136a-137a, 140a-142a. In addition, the Oklahoma standards include beneficial use and antidegradation provisions. The beneficial use provision prohibits "any new point source discharge of wastes [into protected rivers] * * * except under conditions described in Section 3." Oklahoma standard § 5, Pet. App. 96a. Section 3, Oklahoma's antidegradation provision, in turn provides that "[n]o further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed." Pet. App. 96a. Recognizing that certain high quality waters currently exceed their beneficial use standards, Section 3 also provides that "[n]o degradation shall be allowed in high quality waters." *Id.* at 97a. High quality

waters include designated state scenic rivers such as the Illinois River above the Tenkiller Reservoir.

The EPA's Administrative Law Judge upheld the permit, finding that the discharge into the Illinois River would not violate the Oklahoma standards, including the state antidegradation provision, because the discharge would not have an "undue impact" on Illinois River water quality in Oklahoma. Ark. Pet. App. 95a-107a. On Oklahoma's appeal, EPA's Chief Judicial Officer (acting pursuant to a delegation of authority under 40 C.F.R. 124.72(b), see Ark. Pet. App. 145a n.4) found that the ALJ had applied the wrong standard: while compliance with the Oklahoma standards was required, such compliance was to be judged by whether there would be a "detectable" or "measurable" violation of water quality standards at the boundary. *Id.* at 115a-121a.

On remand, the ALJ ruled that the proposed discharge would have no "detectable" impact on the Oklahoma portion of the Illinois River and thus upheld the permit. Ark. Pet. App. 122a-144a. Specifically, the ALJ found that the phosphorous added to the Illinois River by the Fayetteville discharge would largely be assimilated before the river reached the Oklahoma border (*id.* at 129a).[10] Because this small increase in phosphorous would not result in an in-

[10] The ALJ calculated that if the Fayetteville plant released the maximum permissible daily effluent of 3.5 million gallons, 6 pounds of phosphorous per day would reach the Oklahoma state line. Ark. Pet. App. 129a. Other Arkansas entities currently discharge approximately 750 pounds of phosphorous per day into the Illinois river, but new treatment plants under construction at three Arkansas cities will permit "large phosphorus reductions" in their effluent—resulting in an estimated 54% reduction of total phosphorus loading to the Illinois River basin. Ark. Pet. App. 128a, 132a.

crease in eutrophication of waters in Oklahoma (*ibid.*),[11] the ALJ ruled that the Fayetteville discharge would not cause a violation of the Oklahoma standards for nutrients. Ark. Pet. App. 132a. The ALJ also found that the Fayetteville effluent would achieve complete oxygen recovery before the river reached the Oklahoma border; therefore there was no violation of the Oklahoma standards for dissolved oxygen. *Id.* at 140a. Finally, the ALJ found that there would be no discernible violation of aesthetic standards (*id.* at 134a) or of the numeric criteria as to metals or organic chemicals. *Id.* at 143a. In sum, the ALJ concluded that the proposed discharge would not cause a violation of any of the Oklahoma water quality standards.

Oklahoma filed an administrative appeal, and, in an order issued on December 22, 1988, the Chief Judicial Officer declined further review. Ark. Pet. App. 145a-153a. In that order, the Chief Judicial Officer again stated that the governing interpretation of the antidegradation provision is that "[f]or a [water] quality degradation to exist, there must be a degradation caused by a change in some water quality parameter such as nutrients, metals, dissolved oxygen, etc. In his Decision on Remand, the ALJ concluded that the Fayetteville discharge would not cause a detect[a]ble change in any of these parameters." *Id.* at 152a. The Chief Judicial Officer upheld that conclusion (*id.* at 153a), and thus the

[11] The ALJ explained (Ark. Pet. App. 127a, quoting Oklahoma standard § 7.10(b)) that eutrophication is:

> the normally slow aging process by which a lake evolves into a bog or marsh and ultimately assumes a terrestrial state. During eutrophication the lake becomes so rich in nutritive compounds (especially nitrogen and phosphorus) that algae and other microscopic plant life become superabundant, thereby "chocking" the lake, and causing the lake to advance in serial stages.

permit went into effect. Operations pursuant thereto commenced on January 21, 1989.[12]

3. Three petitions for review were filed in early 1989. The Arkansas petition challenged EPA's authority to require that an Arkansas discharger comply with Oklahoma water quality standards. Petitions by the Oklahoma parties and by an environmental group, Save The Illinois River (STIR), alleged violations of Oklahoma water quality standards resulting from EPA's grant of the NPDES permit. Arkansas' petition for review, which was initially filed in the Eighth Circuit, was transferred to the Tenth Circuit and consolidated with those of the Oklahoma parties and STIR.

On July 11, 1990, the Tenth Circuit issued its opinion in this matter. Pet. App. 1a-97a. Rejecting Arkansas' challenge, the court first determined that EPA had properly interpreted the Act to require it to consider, in the NPDES permit procedure, whether a proposed discharge would violate the federally approved water quality standards of a downstream State. *Id.* at 14a-48a. The court proceeded, however, to reverse EPA's decision to issue the permit. The court rejected EPA's conclusion that the antidegradation provisions of the Oklahoma water quality standards are satisfied so long as the Fayetteville discharge does not result in any detectable change to any water quality parameter at

[12] In the course of the administrative proceedings, several rulings were made to which Arkansas objected; Arkansas thereupon moved this Court for leave to file an original action against Oklahoma concerning the application of Oklahoma's water quality standards to an Arkansas permittee. *Arkansas* v. *Oklahoma*, No. 115 Orig. The United States filed a brief as amicus curiae, arguing that Arkansas was attempting to bypass the established administrative procedures for resolving this interstate dispute. The State's remedy, the brief argued, was to let the permitting process run its course and to seek judicial review under the Clean Water Act if it was displeased with the result. The Court denied leave to file an original action. 488 U.S. 1000 (1989).

the Oklahoma state line. Finding that EPA "incorrectly construed and applied [the] Oklahoma regulations" (*id.* at 60a, 83a-84a), the court adopted a novel interpretation of the antidegradation provisions of the Oklahoma standards not advanced by any party. *Id.* at 48a. The court's approach was this: In light of its view of the federal policies embodied in the Clean Water Act and EPA regulations,[13] the court read the Oklahoma antidegradation provisions as prohibiting *any* further release of pollutants that will reach an "already degraded" river.[14] The court summarized its view of the relevant provisions (*id.* at 90a-91a):

> [I]f a body of water is experiencing [water quality standard] violations and a proposed new source would discharge the same pollutants to which those standards apply, that source may not be permitted if its effluent will reach the degraded waters.

Analyzing the record before EPA, the court concluded that there was "ample evidence from which the ALJ could have concluded" (Pet. App. 63a) that the Illinois River in Oklahoma was already degraded (*id.* at 62a-73a),[15] and that

[13] See, *e.g.*, Pet. App. 85a-90a (discussing Clean Water Act policy and legislative history), 54a (court's examination of state policy is "guided by the minimum requirements * * * set forth in EPA's regulation"), 85a (EPA's position inconsistent with "federal water pollution control strategy engineered by the Clean Water Act and enhanced by Oklahoma law"), 90a ("We will not ascribe to the [Clean Water] Act either the gaping loophole or the irrational purpose necessary to uphold EPA's action."), 94a (EPA "decision is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, and frustrates the policy that Congress sought to implement").

[14] The court used 1970, the date of Oklahoma's designation of the relevant portion of the Illinois River as a "scenic river" (see note 7, *supra*), as the benchmark from which to determine whether water quality had been degraded. Pet. App. 62a.

[15] Because the parties had not considered the historic water quality of the Illinois River significant to the propriety of the issuance of the

pollutants from the Fayetteville discharge would reach the Oklahoma boundary (*id.* at 73a-76a) and would contribute to the existing degradation of the river at that point (*id.* at 76a-82a).[16] The court expressly "reject[ed] any notion that once water quality standards have been violated (i.e., the quality of the receiving waters has been degraded), the incremental impact of a proposed additional discharge must itself be detectable." *Id.* at 90a. Instead, the court was of the view that it was necessary to deny the permit because "[a]t worst, [permitting the proposed discharges] will increase the frequency and severity of ongoing violations; at best, it will thwart efforts to bring the river back into compliance with the applicable standards." *Id.* at 91a.

In sum, the court concluded that "EPA's failure to exercise its authority to deny the Fayetteville permit is arbitrary and capricious or otherwise not in accordance with law." *Id.* at 94a. The court flatly held that Fayetteville discharges "may not be permitted" (*id.* at 61a) and that, accordingly, "the Fayetteville permit may not issue." *Id.* at 83a n.49. Instead of remanding to EPA for reconsideration of the permit decision under the judicially prescribed standards, the court of appeals simply "reverse[d] EPA's decision authorizing Fayetteville's municipal treatment plant to discharge a portion of its effluent to the Illinois River basin." *Id.* at 95a.[17]

permit, the court's factual findings on this aspect of the case constitute gleanings from "a record that consists of five boxes and four years of briefs, orders, transcripts, prepared testimony, correspondence, technical reports, and miscellaneous other documents" (Pet. App. 62a) on a matter that had not been addressed in the EPA proceedings, nor briefed and argued by the parties. See *id.* at 61a n.40.

[16] The court was not deterred by its recognition that this latter issue involves "more a scientific question than it is a legal one." Pet. App. 76a.

[17] On October 31, 1990, the court granted Arkansas' motion to stay the issuance of the mandate pending this Court's action on petitions for certiorari; accordingly, the discharges from the Fayetteville plant are continuing.

SUMMARY OF ARGUMENT

Federal – not state – law governs the complex issues raised in disputes involving interstate water pollution. In the Clean Water Act, Congress has entrusted to EPA the primary responsibility for resolving such federal issues that arise in the context of its consideration of applications for NPDES permits. Before issuing a permit authorizing discharges into an interstate waterway, EPA must determine that the proposed permit will meet all applicable requirements of the Act and implementing regulations, including compliance with federally approved water quality standards of the receiving State. But in any interstate dispute involving the application of a receiving State's water quality standards, the statutory scheme provides that EPA – not the receiving State – is to determine the proper application of the standards. Accordingly, the validity of EPA's decision to issue the Fayetteville permit depends on whether the Agency reasonably interpreted and applied applicable Oklahoma water quality standards, not on whether issuance of the permit is consistent with the reviewing court's own interpretation of those standards as a question of the law of the receiving State *simpliciter*.

In this case, EPA reasonably concluded that the Oklahoma antidegradation standard permits a discharge that will have no detectable impact on the current condition of Oklahoma's protected waters. The court of appeals, however, preferred a policy that would prohibit any discharge that would theoretically reach waters that were already degraded. Under well-established principles of administrative law, this preference was an impermissible basis for rejecting EPA's contrary interpretation. To make matters worse, the court's interpretation would create serious practical difficulties in implementing water quality requirements for interstate waterways. The court of appeals' error was compounded by the fact that the court based its decision on issues not raised or briefed by the parties; engaged in independent fact-finding that disregarded the scientific expertise of the Agency; and declined to remand the permit decision to the Agency. In short, the court of appeals not only ignored the special role given EPA under the Clean Water Act but transgressed basic principles of administrative law which require reviewing courts to give appropriate deference to the administrative process.

ARGUMENT

I. FEDERAL LAW GOVERNS THE INTERPRETATION AND APPLICATION OF FEDERALLY APPROVED STATE WATER QUALITY STANDARDS TO OUT-OF-STATE DISCHARGES

The court of appeals fundamentally misconstrued the teachings of the Court and the effect of the Clean Water Act in the context of an interstate dispute. Instead of interpreting the requirements of the Clean Water Act in this context as a matter of federal law, the court of appeals treated the question of how the Oklahoma water quality standards (specifically, the beneficial use and antidegradation provisions) should be interpreted in this case as entirely a question of state law.[18] It then undertook to construe the provisions on its own without first examining the reasonableness of EPA's interpretation of the federally-approved standard. Pet. App. at 53a-54a.

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[18] For instance, the court noted that "[t]he Oklahoma courts apparently have not interpreted these provisions" and in a footnote concluded that an opinion of the Oklahoma Attorney General discussing the provisions seemed contrary to the language of the provisions themselves. Pet. App. 53a.

A. This Court's Decisions Establish That Interstate Water Pollution Issues Are To Be Resolved By Application Of Federal Law

This Court's decisions make clear that when interstate water pollution issues are involved, the interpretation of the Clean Water Act's requirements is a matter of federal, not state, law. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 102 (1972) (*Milwaukee I*); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 492 (1987). Furthermore, the Court has recognized that the 1972 Amendments to the Federal Water Pollution Control Act (now the Clean Water Act) "establish an all-encompassing program of water pollution regulation" (*City of Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981) (*Milwaukee II*)), under which "[f]ederal courts lack authority to impose more stringent effluent limitations * * * than those imposed by the agency charged by Congress with administering this comprehensive scheme" under the guise of applying federal common law. *Id.* at 320.[19] And in *Ouellette*, the Court specifically concluded that "the CWA precludes a court from applying the [common] law of an affected State against an out-of-state source." 479 U.S. at 494. Instead, "the Act limits the right to administer the permit system to the EPA and the source States." *Id.* at 495. It follows from this Court's precedents that the question of the proper standards to be applied to the Fayetteville discharges under the Clean Water Act ultimately involves a question of federal law.

[19] In explaining why courts should not invoke federal common law to supplement the comprehensive statutory scheme, the Court noted (451 U.S. at 325): "[n]ot only are the technical problems difficult – doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise – but the general area is particularly unsuited to the [case-by-case] approach inevitable under a regime of federal common law." These same considerations, of course, counsel reliance on the expert agency's interpretation and application of the relevant federal requirements.

B. The Clean Water Act Assigns To EPA The Responsibility For Resolution Of Disputes Between States Over The Discharge Of Pollutants Into Interstate Waters

The Clean Water Act directs EPA to address interstate water pollution issues in either of two ways, depending upon whether the source State or EPA is the permit-issuing authority. If the source State's program has been approved by EPA under Section 402(b), 33 U.S.C. 1342(b), the State may issue the permit, unless EPA objects pursuant to Section 402(d)(2), 33 U.S.C. 1342(d)(2).[20] Where, as here, EPA is the permit-issuing authority, EPA is directly responsible for determining whether a proposed permit will meet all applicable requirements of the Act and implementing regulations (Section 402(a)). Although the federal permitting authority may not issue a permit if the source State determines that the permit will not comply with its water quality standards, the federal permitting authority need only consider the "recommendations" of a receiving State in determining whether the permit will comply with that State's standards. Section 401(a)(1) and (2), 33 U.S.C. 1341(a)(1) and (2). As this Court explained in *Ouellette*, 479 U.S. at 491, "the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program." Thus, the text of the Clean Water Act commits the determination of whether the permit will

[20] That provision sets forth two grounds for an objection. See *Champion Int'l Corp.* v. *EPA*, 850 F.2d 182, 185 (4th Cir. 1988). Under Section 402(d)(2)(A), EPA may object when there is an unresolved interstate dispute that has been brought to EPA's attention under the procedures in Section 402(b)(5)(providing for notification to EPA of a receiving State's objections to the issuance of the permit, and of the permitting State's action with regard to those objections). Under Section 402(d)(2)(B), EPA may – even in the absence of a state complaint – object to the issuance of any permit "as being outside the guidelines and requirements" of the Act.

achieve compliance with the receiving State's water quality standards to the federal permitting agency:[21]

> Such agency * * * shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.

33 U.S.C. 1341(a)(2). In determining compliance, the agency necessarily has to make decisions concerning the proper interpretation of the receiving State's water quality standards and how those standards apply to an out-of-state discharger.[22]

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[21] The permitting authority's responsibility under federal law to determine whether the issuance of the permit will comply with the downstream State's standards suggests a fully sufficient alternative basis for affirming the EPA decision to issue a permit in this case. The threshold question of the showing necessary to determine under the CWA whether there is compliance with any particular state standard is itself a matter of federal, not state, law. Therefore, EPA's decision that "the permit should be upheld if the record shows by a preponderance of the evidence that the authorized discharges would not cause an actual *detectable* violation of Oklahoma's water quality standards" (Ark. Pet. App. 117a) represents an EPA interpretation of the *federal* statute's requirement for compliance in the context of this case, rather than an interpretation of any Oklahoma standard at all. Under this alternative analysis, the "detectability" requirement simply represents an intensely practical conclusion that, as a matter of federal law, the threshold question of whether an issue of compliance with the receiving State's standards is even presented is definitively answered in the negative where the effect of the proposed discharge cannot be detected at the critical point – the receiving State's boundary. *Id.* at 118a n. 16.

[22] The Arkansas petition correctly recognizes that, in determining whether to issue a permit for a discharge into interstate waters, EPA has authority "to assess compliance with downstream standards." Ark. Pet. 13. But Arkansas also appears to suggest that EPA is free to ignore the receiving State's standards altogether, or to balance the respective interests of the States through which an interstate waterway passes. *Id.* at 13-16. EPA has never asserted such authority, in this or any other

As a result, in any interstate dispute involving the application of a downstream State's water quality standards, the statutory scheme provides that EPA – not the downstream State – is to determine the proper application of the standards, either in reviewing the permits for possible objection under Section 402(d) or in its role as permit issuer. This federal responsibility complements EPA's responsibility under the Act to review and approve proposed state water quality standards. Section 303(c), 33 U.S.C. 1313(c). Before granting approval, EPA must determine that the proposed standard "meets the requirements" of the Act. Section 303(c)(3), 33 U.S.C. 1313(c)(3).[23] In determining whether a proposed standard meets the statutory requirements, it is, of course, necessary for EPA to determine the meaning of that standard. Therefore, if a dispute concerning the meaning of the standard subsequently arises in the context of a permitting decision,[24] EPA's interpretation of the

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case, and the terms of the NPDES permit issued by EPA to Fayetteville would not have been affected if EPA had agreed with Arkansas' interpretation. It is therefore unnecessary for this Court to consider whether the Act gives EPA the authority claimed for it by Arkansas.

[23] If EPA cannot make that finding, it must allow the State to make the changes necessary to bring the standards into conformity with the Act. If the State fails to do so in a timely manner, EPA will promulgate the water quality standards for the State. Section 303(c)(3) and (4), 33 U.S.C. 1313(c)(3) and (4).

Arkansas suggests (90-1262 Pet. 14) that EPA has no authority to disapprove a state water quality standard on the ground that it has a discriminatory impact on out-of-state dischargers. EPA has never disapproved a state standard on the ground that it has such a "predatory" effect, and accordingly has not considered the extent of its power to do so, or, if such power exists, the criteria to be applied to identify a predatory standard. Because there was no such disapproval of the Oklahoma standards in this case, the Court need not address that issue here.

[24] Since many water quality standards are, like the Oklahoma antidegradation provision at issue here, in narrative form and thus

disputed provision, which presumably reflects its understanding of that provision when approval was granted, should normally be dispositive.[25]

C. EPA's Interpretation Of The Federally-Approved Oklahoma Standards Is Entitled To Judicial Deference

In light of the key role assigned by the Clean Water Act to EPA as arbiter of interstate water pollution disputes under the Act and EPA's responsibility for approving state-submitted water quality standards, EPA's interpretation of the water quality standards involved in this case should, under established principles of administrative law, be accorded deference. It is beyond dispute that a reviewing court should defer to an agency's reasonable interpretation of a regulation it is charged with administering. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Navistar Int'l Transp. Corp.* v. *EPA*, 858 F.2d 282, 288 (6th Cir. 1988), cert. denied, 490 U.S. 1039 (1989) (EPA's interpretation of a federally approved state air quality standard is accorded the same deference by a reviewing court as EPA's interpreta-

necessarily expressed in rather general terms, disagreements as to their meaning will often surface only when the standards are applied in the context of a specific permit proceeding—as happened here.

[25] To guide the States in the promulgation of water quality standards, EPA regulations set out (at 40 C.F.R. Pt. 131) model water quality standards satisfying the requirements of Section 303 of the Clean Water Act, 33 U.S.C. 1313. Where, as here, the water quality standard adopted by the State is based on the EPA model (see note 27, *infra*), and there is no clear indication at the time the proposed standard was submitted to EPA for approval that the State intended a different meaning, it is surely reasonable and appropriate for EPA to construe the state standard as being consistent with the model provision.

tion of its own regulations). Cf. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984). Accordingly, to the extent that the terms of a federally approved state standard are ambiguous or silent on a particular point at issue in an interstate dispute, EPA's interpretation of the standard should be followed "unless it is plainly erroneous or inconsistent with the regulation." *United States* v. *Larionoff*, 431 U.S. at 872 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

In short, the question is not whether EPA interpreted the water quality standards applicable to the Oklahoma portion of the Illinois River in the same way they would be interpreted by the reviewing court or even by Oklahoma itself (see, *e.g.*, Pet. App. 60a). Instead, the question, in reviewing the validity of EPA's administrative action, is whether EPA's reading and application of those standards in the permitting proceeding was reasonable.

The court of appeals failed to address this issue. Instead, it candidly admitted that it was substituting its own interpretation for that of EPA (Pet. App. 48a-49a, 54a-55a), adopted a restrictive construction of the applicable standards not advanced by any party (*id.* at 48a), and rejected EPA's construction out of hand. *Id.* at 53a-57a.[26]

II. THERE WAS NO APPROPRIATE BASIS FOR REJECTING EPA'S INTERPRETATION AND APPLICATION OF THE OKLAHOMA STANDARDS

Before issuing the permit to Fayetteville to discharge effluent into a tributary of the Illinois River, EPA as the per-

[26] Thus, the court stated without elaboration that the "ALJ's interpretation defies the plain language of the Beneficial Use Limitations and the Anti-Degradation Policy that it references." Pet. App. 57a. The court ignored the fact that the governing interpretation was set forth in the Chief Judicial Officer's opinion of June 28, 1988 (Ark. Pet. App. 117a) and was reaffirmed in his order of December 22, 1988, denying review. *Id.* at 152a-153a.

mitting agency had to determine whether the permit conditions would assure compliance with the Oklahoma Water Quality Standards applicable to that river in Oklahoma. In particular, EPA had to interpret Oklahoma standard § 3, which provides that "[n]o degradation shall be allowed in high quality waters," including the portion of the Illinois River between the Oklahoma boundary and Tenkiller Reservoir. EPA concluded that Oklahoma standard § 3 permits a discharge upstream from protected waters so long as that discharge will have no detectable impact on current water quality in the protected waters. The court of appeals rejected both the "no-detectable impact" and the "current condition" aspects of EPA's interpretation of Oklahoma standard § 3 as inconsistent with its plain meaning (Pet. App. 53a). The court ruled that the antidegradation requirement prohibited the issuance of any permit for a new discharge in Arkansas—whether or not that discharge would have any detectable impact on water quality parameters in Oklahoma—if the water quality in the waterway in Oklahoma has been degraded compared to an historical benchmark (here, 1970, when the River was designated a "scenic river"). *Id.* at 62a, 90a. In so concluding, the court improperly rejected EPA's reasonable interpretation of the federally approved antidegradation standard.

A. EPA Reasonably Construed The State Antidegradation Provision To Allow An Out-Of-State Discharge Where That Discharge Would Have No Detectable Impact On The Current Water Quality Of The Protected Waters

In its operative provisions, Oklahoma Water Quality Standard § 3, which was adopted in 1982 (Pet. App. 50a n. 29), is a verbatim replication of the federal antidegradation standard that was then in effect.[27] Accordingly, in considering the Fayetteville NPDES permit application, EPA interpreted the Oklahoma standard as identical to the federal one.

While a similar antidegradation standard may be adopted by any State,[28] there has been no national rulemaking or determination on how to interpret and apply the terms of the standard.[29] Questions can therefore arise as to what constitutes a "degradation" of water quality, and as to the benchmark from which degradation is to be measured.

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[27] Even the court of appeals noted the similarities between the state provision and EPA's model provision (Pet. App. 54a n.34). Compare the antidegradation provision of Oklahoma standard § 3:

> No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance.

with the corresponding language in EPA's model antidegradation regulations in effect until 1983 (40 C.F.R. 35.1550(e)(2) (1981)):

> Additionally, no degradation shall be allowed in high quality waters which constitute an outstanding National resource, such as waters * * * of exceptional recreational or ecological significance.

The current regulations provide that high quality waters "shall be maintained and protected" (40 C.F.R. 131.12(a)(3)). This change was to allow for temporary degradation associated with construction projects. The change did not affect the restrictions for long-term sources of pollutants. 48 Fed. Reg. 51,402-51,403 (1983).

[28] The antidegradation requirements of the federal model water quality standards were created by administrative action. The antidegradation policy was first enunciated by Secretary Udall of the Interior Department in 1968. The instant antidegradation standard was adopted by EPA in 1975. Congress subsequently referred to the antidegradation policy in the 1987 Amendments to the Clean Water Act. See 33 U.S.C. 1313(d)(4)(B).

[29] This standard is termed a Tier III antidegradation standard, and the waters protected by it are known as "outstanding national resource waters," or ONRW.

1. There is general agreement that the "no degradation of water quality" requirement means that a new discharge should not result in a lowering of water quality in an ONRW,[30] but EPA has not attempted to prescribe general standards for determining what constitutes a "lowering" of water quality. Instead, the individual decisionmaker, i.e., the State or EPA, must determine on a case-by-case basis whether addition of pollutants to a water body will result in a lowering of water quality.[31]

In this interstate case, EPA's determination of what constitutes degradation, or a lowering of water quality, was set forth in the Chief Judicial Officer's initial decision of June 28, 1988 (Ark. Pet. App. 117a):

> [A] mere theoretical impairment of Oklahoma's water quality standards – *i.e.*, an infinitesimal impairment predicted through modeling but not expected to be actually detectable or measurable – should not by itself block the issuance of the permit. In this case, the permit should be upheld if the record shows by a preponderance of the evidence that the authorized discharges would not cause an actual *detectable* violation of Oklahoma's water quality standards.

The Chief Judicial Officer's order of December 22, 1988, clarified the application of this interpretation to the State's antidegradation policy. The CJO explained that because the

[30] See, *e.g.*, Region IV, Questions and Answers on Implementation of Tier III of the Federal Antidegradation Policy: Protection of Outstanding National Resource Waters (Apr. 20, 1989), which states that there should be no new discharge of pollutants directly into an ONRW; discharges to tributaries are permissible if they do not lower water quality at the boundary of the ONRW.

[31] See, *e.g.*, Region V, Guidance for Antidegradation Policy Implementation for High Quality Waters (Dec. 3, 1986); Region IX, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 (June 3, 1987).

antidegradation policy for waters subject to the highest degree of protection is in fact a "policy," not a numeric standard, it would be violated if there were any water quality degradation in such waters. But "[f]or a quality degradation to exist, there must be a degradation caused by a change in some water quality parameter such as nutrients, metals, dissolved oxygen, etc." Ark. Pet. App. 152a. In other words, if a discharge "will not cause a detect[a]ble change in any of the relevant water quality parameters, it logically follows that there will not be a 'quality degradation.'" *Id.* at 152a-153a. Thus, EPA interpreted the antidegradation policy as permitting a discharge upstream from protected waters so long as that discharge will have no detectable impact on water quality parameters in the protected waters.[32]

This interpretation of the antidegradation provision was entirely reasonable and consistent with the language of the Oklahoma standard, the federal regulation on which it was based, and the policies and purposes of the Clean Water Act. At least where the effects of a discharge are undetectable at the State boundary, the receiving State can have little more than a theoretical basis for concluding that its water has been degraded. In such circumstances, it is at least reasonable for EPA to conclude that the discharge is not prohibited.

2. Determining whether a new discharge will degrade downstream water quality requires identification of the water quality level to be protected. The parties to this case, and the EPA decisionmakers, considered the relevant water

[32] Indeed, Oklahoma took essentially the same position in briefing before EPA. It there stated, "any *detectible [sic] increase* in any 'wastes', defined as '[i]ndustrial waste and all other liquid, gaseous or solid substances which may pollute or tend to pollute any waters of the State,' will be a violation of the [scenic river] designation" (emphasis added). A.R. Doc. B146, at 45.

quality to be that in existence at the Oklahoma border at the time the permit was under consideration. Again, this was a reasonable interpretation and application of the anti-degradation provisions of Oklahoma standard § 3. That provision states only that "[n]o degradation shall be allowed in high quality waters"; it does not provide a description of the water quality to be maintained. Nothing in the Oklahoma standards provides a general benchmark date, nor is there in the standards any suggestion that there is a particular benchmark date for the Illinois River. In these circumstances, EPA's reliance on current water quality at the boundary as the applicable benchmark was entirely reasonable.[33]

The court found that the "plain language" of the Oklahoma beneficial use and antidegradation provisions showed that they prohibit discharges of pollutants into a scenic river if "its water quality *has been degraded* or if the new source *would degrade* it." Pet. App. 53a-54a. But the court did not identify the specific regulatory language upon which it relied, and in fact no language in the Oklahoma standards indicates an intent to consider whether water quality "has been degraded" from the standard it had at some point in the past.

[33] States must affirmatively designate water bodies to be outstanding national resource waters protected from degradation under Tier III standards. Modern designations often do contain a reference date or a description of the water quality to be maintained. The application of such an antidegradation provision could, of course, raise issues not relevant to this case. In any event, a State is highly unlikely to adopt as a benchmark date a time substantially antedating the application of the protective standard to the waterway involved. Compare Okla. Stat. Ann. tit. 82 § 1452(b)(1) (West 1990)(designation as scenic river) with *id.* § 1457 (authorization to impose pollution controls on scenic rivers).

B. The Court of Appeals' Policy Choices Are Not Required By The Clean Water Act or Applicable Regulations

The court of appeals' reading of the EPA-approved state antidegradation provision was based primarily on two conclusions: (1) that "degradation" must be measured from some historic benchmark date, undefined in the provision itself, rather than from the current condition of the waterway, and (2) that if current water quality is adjudged poorer than it was at that prior time, no further upstream discharges may be permitted. Taken together, these conclusions establish a "zero-discharge" requirement once the waters in question fall below the historic benchmark.[34] Moreover, that requirement extends beyond a receiving State's borders to preclude any discharges in all upstream tributaries of the interstate waterway. But the conclusions reflected in the zero-discharge requirement represent policy choices not required by the Clean Water Act, EPA's regulations, or the federally approved Oklahoma standards. The court's adoption of those conclusions certainly does not suggest that EPA's decision in this case, which reflected alternative permissible policy choices, was in any way unreasonable.[35] Thus, the court had no authority to impose a zero-discharge requirement.[36]

[34] It is not entirely clear whether the court intended this requirement to apply only to "high quality waters" subject to an antidegradation policy similar to Oklahoma's, or whether it was intended – as Arkansas assumes (Ark. Pet. 20-23) – to apply to any application for a permit to discharge into waters upstream from waters not presently in compliance with any applicable standard.

[35] Moreover, if the court's zero-discharge requirement was intended to apply to water quality standards generally (see note 34, *supra*), the court ignored EPA's regulation specifically addressing the circumstances under which a discharge may be allowed into waters that do not currently meet the applicable standards. 40 C.F.R. 122.4(i).

[36] As this Court explained in discussing judicial interpretations of

The practical difficulties occasioned by such judicial intrusion into EPA's responsibilities are vividly illustrated by this case. The ruling of the court of appeals—that *no* discharge may be permitted upstream if the pollutants in the effluent would reach a degraded downstream waterway—would create serious problems of implementation.[37] It may be nigh unto impossible to demonstrate that pollutants in an upstream discharge will *never* reach a point downstream. While modelling or other available predictive techniques may persuasively demonstrate that pollutants are *unlikely* to survive in the water system, so that only a *de minimis* amount would reach protected waters, it may be statistically impossible to show that *no* amount of pollutant will ever pass into those waters. The court's zero-discharge standard does not consider whether there is an

the requirements of the Clean Air Act in *Chevron*, 467 U.S. at 865:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.

[37] Moreover, the court of appeals' analysis leaves no room for considering whether a discharge will actually dilute, and thereby improve, the ambient concentration of pollutants in the affected stream. For most pollutants, the effect of a discharge on ambient water quality is a function of the relative concentration of the stream and the discharge. If the discharge has a lower concentration of pollutants than the stream, it will dilute, and thereby improve, the stream. Thus, logically even where a stream is in violation of a numerical water quality standard, a high volume discharge containing the pollutant of concern may nonetheless not only not exacerbate the violation, but it may even mitigate or cure that violation, if the concentration of the pollutant in the discharge is low enough.

exception for *de minimis* amounts of pollutants.[38] If there is to be such an exception, it must be defined; under the court's ruling, the standard must be somewhere below the level of detectability, which poses obvious problems for enforcement. If there is to be no exception for *de minimis* amounts of pollutants, then the consequences of a state designation of high quality waters to be subject to the suggested federal antidegradation policy are substantially different from those anticipated by EPA (and, most likely, the States that have adopted EPA's model standards).

More generally, the Agency's responsibility for approving state standards would be gravely undermined if its reasonable interpretations of those standards could be jettisoned on judicial review. This is of fundamental practical importance, because EPA's ability to perform effectively its statutory role in resolving interstate disputes over the issuance of NPDES permits requires the Agency to rely on its own reasonable construction of a state standard. Indeed, if reviewing courts may substitute their own interpretations of an EPA-approved state standard, then similarly worded standards of various States may well have different meanings in different circuits, or even within the same circuit. The resulting uncertainty and confusion—especially in lengthy river systems involving several receiving States—would lead to precisely the situation that Congress sought to avoid by enacting the comprehensive Clean Water Act

[38] Compare Ark. Pet. App. 128a-132a (ALJ's findings that maximum permissible daily effluent from the Fayetteville plant would result in increase of six pounds of phosphorus per day at Oklahoma boundary, although other Arkansas entities currently discharge 750 pounds of phosphorus per day into Illinois River in Arkansas) with Pet. App. 73a-76a (court determination that sufficient phosphorus will reach the Illinois line from the Fayetteville plant to violate antidegradation standard). See note 10, *supra*.

Amendments to replace the former case-by-case approach of the federal common law. See *Milwaukee II*, 451 U.S. at 324-325.

III. THE COURT OF APPEALS SHOULD HAVE CONSIDERED WHETHER THE RECORD SUPPORTED ISSUANCE OF THE PERMIT UNDER THE INTERPRETATION OF THE OKLAHOMA STANDARDS ADOPTED BY EPA

Because the court of appeals rejected the standard EPA used in determining that the Fayetteville discharge would be in compliance with Oklahoma water quality standards, the court did not consider whether the agency's factual findings were based on substantial evidence in the administrative record. See Pet. App. 89a.[39] Nor did the court remand to EPA to reconsider the propriety of issuing a permit to Fayetteville under the legal standards the court thought proper. Instead, the court undertook a totally inappropriate and unjustified inquiry into whether the record compiled at the administrative hearing supported the issuance of a permit to Fayetteville under the legal standards the court set out. This displacement of EPA's fact-finding and decisionmaking authority constituted clear error.

Firmly established principles of administrative law required the court to remand to EPA for further proceedings once it determined (again, erroneously, in our view) that the original agency decision was in error. This is fundamental: It is for the administrative agency, not the court, to evaluate different permissible courses of action and ultimately to make a choice. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). This Court stated the "guiding principle" nearly forty years ago in *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952):

> [T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.

See also *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 140-146 (1940). And the Court has recently reaffirmed the principle, noting that the agency's task on remand remains "infused with judgment and discretion, requiring the accommodation of conflicting policies that were committed to the agency's care." *Department of the Treasury* v. *FLRA*, 110 S. Ct. 1623, 1629 (1990) (internal quotation marks omitted). "It is not a task [courts] ought to undertake on the agency's behalf in reviewing its orders." *Id.* at 1630.

In undertaking its own inquiry into whether an NPDES permit should be issued, the court of appeals fundamentally misapplied the "substantial evidence" standard of review of agency action. The "substantial evidence" test requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 522 (1981). The proper inquiry for the court is whether the *administrative agency's* findings are supported by substantial evidence, and "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966). Adherence to the substantial evidence test, when properly applied, "frees the reviewing courts of the time-consuming and difficult task of

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[39] The court there stated:

> EPA and the Arkansas parties urge that the Fayetteville discharge should be permitted because its individual impact on Illinois River water quality will not be detectable. While this may prove true (and we pass no judgment thereon), we reject the argument because of its unavoidable results.

weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." *Ibid.*

The court of appeals turned this test on its head, searching the voluminous administrative record to determine whether there was "substantial evidence" to support its own, independent factual determinations. The court openly acknowledged that it was taking such an approach:

> The record contains substantial evidence from which the ALJ *could have found* that the water quality of the Illinois scenic river has been degraded and that water quality standards were being violated prior to the onset of Fayetteville's discharge to the river * * * .

Pet. App. 61a (emphasis added). Similarly, the court stated that its review of the record indicated that there was substantial evidenee that the Illinois River had been degraded by the same types of pollutants that would be contained in Fayetteville's effluent, and that Fayetteville's effluent will be transported downstream to Oklahoma. Pet. App. 81a. With this *de novo* review of the record, the court of appeals substituted itself for the agency as the primary fact-finder in determining the scientific effects of issuing the Fayetteville permit.

Not content with displacing EPA as fact-finder, the court of appeals went further and flatly "reversed" the issuance of the Fayetteville permit without remanding to EPA. Pet. App. 95a. But the Clean Water Act, 33 U.S.C. 1341(a)(2), places the duty on the permit-issuing authority to "condition such * * * permit in such manner as may be necessary to insure compliance" with water quality standards. Only if the permitting authority determines that "the imposition of conditions cannot insure such compliance" is the agency to deny the permit. Section 401(a)(2), 33 U.S.C. 1341(a)(2). EPA, the permitting agency, has never made any such determination. Prior to the court of appeals' decision, the agency had no occasion to determine the effects on Oklahoma water quality of placing further conditions in the Fayetteville permit. Accordingly, even if, contrary to our contention, the court of appeals' decision were otherwise to be upheld, the court's refusal to remand the case to the agency was inconsistent with the governing statute.

In sum, the court of appeals usurped EPA's statutorily prescribed functions. The court independently determined the legal standards applicable to the issuance of the Fayetteville NPDES permit; it determined the facts from the record *de novo*; and it issued a remedial order independent of the statutory prescription. Indeed, but for the development of the record by the administrative agency, the court's actions in this case closely mirrored the judicial role in a suit based on the federal common law of nuisance. In such cases, the federal court determines the applicable legal standards, serves as fact-finder, and develops a remedy. But, as this Court stated in *Milwaukee II*, 451 U.S. at 325, Congress vested decisionmaking authority in interstate water disputes "in administrative agencies possessing the necessary expertise" and displaced the federal common law authority formerly exercised by the federal courts. With this decision, the court of appeals came full circle, reasserting plenary authority under the guise of judicial review of agency action.

CONCLUSION

The judgment of the court of appeals should be reversed as to the questions presented in Petition No. 90-1266.

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MAY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991 — 282 061 20570

[redacted]

STATE OF ARKANSAS, *et al.*,
Petitioner
v.
STATE OF OKLAHOMA, *et al.*

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner
v.
STATE OF OKLAHOMA, *et al.*

On Writs of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF RESPONDENTS THE STATE OF OKLAHOMA, THE OKLAHOMA SCENIC RIVERS COMMISSION, THE OKLAHOMA POLLUTION CONTROL COORDINATING BOARD AND SAVE THE ILLINOIS RIVER (S.T.I.R.)

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QUESTIONS PRESENTED

1. Whether the Clean Water Act requires a point source discharger to comply with EPA-approved water quality standards of affected downstream states in a permit proceeding under the National Pollutant Discharge Elimination System (NPDES);

2. Whether the EPA failed to properly consider the existing degradation in the Illinois River in Oklahoma when considering Fayetteville's application for an NPDES permit to discharge additional pollutants to that River, and as a result of this failure, incorrectly applied Oklahoma's standards prohibiting any degradation of that River; and

3. Whether the Court of Appeals correctly applied Oklahoma's EPA-approved standards, prohibiting any degradation of a state-designated scenic river, to a situation where the River was already degraded, and where EPA had found that additional pollutants of the kind that had contributed to the existing degradation would reach the River from the new discharge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1262

STATE OF ARKANSAS, *et al.*,
Petitioner

v.

STATE OF OKLAHOMA, *et al.*

No. 90-1266

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

v.

STATE OF OKLAHOMA, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF RESPONDENTS THE STATE OF OKLAHOMA, THE OKLAHOMA SCENIC RIVERS COMMISSION, THE OKLAHOMA POLLUTION CONTROL COORDINATING BOARD AND SAVE THE ILLINOIS RIVER (S.T.I.R.)

STATEMENT

Introduction. Fayetteville, Arkansas seeks to achieve its water quality goals at Oklahoma's expense. Fayetteville's old water treatment plant discharged all of its treated effluent into the White River in Arkansas. By

the early 1980s, the White River was experiencing water quality problems. Moreover, in 1984 Arkansas adopted more protective water quality standards for the White River. Fayetteville decided to build a new, more modern plant. But Arkansas could not achieve its goal of improving the quality of the White River up to the level to satisfy the new 1984 standards if Fayetteville discharged all of its effluent to that river. So Fayetteville asked the EPA for permission to transport half its discharge to another river—the Illinois River—which flows from Northwestern Arkansas into Oklahoma.

Even when it applied for a grant to build the new plant, Fayetteville informed EPA that the Illinois River in Oklahoma was already degraded, largely by phosphorous and other pollutants originating in other Arkansas communities. Fayetteville told EPA that if it got its permit, the new discharge to the Illinois River would further degrade the condition of the River in Oklahoma and violate Oklahoma's water quality standards. And, after a hearing on Fayetteville's permit application where EPA received unrefuted evidence (including photographs) that the Illinois River was degraded, EPA entered a finding that up to a fourth of all the new pollutants discharged into the River would be available as food for additional algae growth in Oklahoma. Nevertheless, EPA issued the permit. Oklahoma asks this Court to affirm a Tenth Circuit ruling that held the permit unlawful under the Clean Water Act and to protect the already degraded Illinois River from further pollution from Fayetteville.

Legal Framework. The Clean Water Act has as its goal the "restoration and maintenance of the chemical, physical and biological integrity of the Nation's waters," through the elimination of the discharge of pollutants. CWA § 101.[1] "Pollutant" is defined broadly by Congress

[1] By its choice of the word "integrity," Congress intended to convey "pristine." "In those water bodies which are not pristine, it should be the national policy to take those steps which will result in change towards that pristine state in which the physical, chemical, and biological integrity of the water body can be said to exist." S. Rep. No. 414, 92nd Cong., 2d Sess. (1972), *reprinted in* 2 Sen. Comm. on Public Works, 93rd Cong., 1st Sess., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 1494 (1973) (hereinafter, 1972 LEGIS. HIST.).

to include "industrial, municipal, and agricultural waste discharged into water." CWA § 502(6).[2] To achieve its goal, Congress imposes a nationwide prohibition on the discharge of any pollutant. CWA § 301. The only exceptions to this no discharge prohibition arise when an aspiring discharger can prove that it can satisfy statutory requirements known as "effluent limitations," which are restrictions on "the quantities, rates, and concentrations" of substances discharged from point sources. CWA §§ 301, 502(11). There are two types of effluent limitations.

First, the discharger must satisfy technology-based effluent limitations, which the Act requires the EPA to promulgate. Second, a permit applicant must show that it can comply with "any more stringent" limitations "*required to implement*" EPA-approved water quality standards. CWA § 301(b)(1)(C) (emphasis added). Water quality standards are key to achieving the Act's goals. Because technology-based limitations take into account only existing technology, it would be possible for a discharger to satisfy them, and nevertheless harm the quality of the receiving waters, depending on the nature of his discharge and the aquatic qualities of the receiving stream. Water quality standards, on the other hand, are based on the amounts and kinds of pollutants in the waters to which discharges flow as well as on desired water quality. *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 109-10 (D.C. Cir. 1987). Limitations that must be imposed to implement water quality standards need not be based on technology, and they thus

[2] The Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988), is cited by section number in this brief. Parallel citations to the United States Code are provided in the Table of Authorities.

fine-tune the permit process to insure protection of water quality, and, ultimately, realization of the Act's goals. Both technology based effluent limitations, and limitations based on mandatory compliance with EPA-approved water quality standards, are enforced through an NPDES permit proceeding. CWA § 402. If an applicant is unable to demonstrate that it will implement water quality standards, the "no discharge" prohibition applies and the permit must be denied, even if the applicant is in compliance with technology-based limitations. *See Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 588 (D.C. Cir. 1980) (Congress placed great reliance on the permit process as the means of finally achieving water quality standards.).

States have primary responsibility to "prevent, reduce, and eliminate pollution." CWA § 101(b). While EPA develops the technological guidelines that establish national minimum requirements for pollution control, the states adopt standards specifically tailored to the needs of individual bodies of water.[3] At least once every three years, each state must hold public hearings to adopt standards that "enhance the quality of water and serve the purposes of this Act." CWA § 303(c). They are then submitted to the EPA Administrator, who approves them if "consistent with the requirements of the Act." When approved, the standards "*shall* thereafter be the water quality standard[s] for the applicable waters of the State." CWA § 303(c)(3). EPA may not disapprove, or subsequently soften, standards because they are more protective of water quality than the technological limitations. The Act encourages states to "require purer water," and to "embody this judgment in binding 'water

[3] The EPA is also authorized to set effluent limitations based on water quality when technology-based limitations do not suffice to achieve a minimum quality of water. However, the imposition of such limitations does not delay or relieve a discharger from compliance with more protective state water quality standards approved by EPA pursuant to CWA § 303. CWA § 302(c), *See Homestake Mining Co. v. EPA*, 477 F. Supp. 1279, 1285-86 (D.S.D. 1979).

quality standards' that must be respected in the drafting of a permit [under] § 301(b)(1)(C)." *Montgomery Envtl. Coalition v. Costle*, 646 F.2d at 574-75.

Each state's water quality standards must have at least three components: (1) designated uses to be "achieved and protected," e.g., warm water fishery; (2) water quality criteria, expressed in numerical or narrative form, which reflect the limits on the quantities of pollutants in a body of water that are necessary to protect designated uses; and (3) an antidegradation policy. 40 C.F.R. § 131.10-.19 (1990). The purpose of this antidegradation policy is to insure protection of rivers whose quality exceeds that necessary to protect its designated uses. Since the Illinois River in Oklahoma is such a river, this policy is of critical relevance to this proceeding.

The structure of the antidegradation policy is like a pyramid. At the base, states must insure the level of water quality necessary to protect existing uses. *Id.* at § 131.12(a)(1). At the next level, EPA mandates a higher level of protection for waters whose quality exceeds that necessary to support propagation of fish, shellfish, wildlife and recreation. The quality of these waters must be maintained and protected, unless the state makes a determination that allowing lower water quality is necessary to accommodate economic and social development.[4] Finally, for waters at the top of the pyramid, *no degradation* from a point source may be permitted under any circumstances, even to accommodate economic development. These waters, designated by the states, are high quality waters that constitute "an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance." ("ONRW" waters) *Id.* at

[4] But even when a state makes such a determination, EPA requires the state to fully protect existing uses, and to achieve the highest statutory and regulatory requirements for new and existing point sources. *Id.* at § 131.12(a)(2).

§ 131.12(a)(3).[5] EPA projects this three-tiered system onto the states by requiring each state to adopt a policy that "at a minimum" is consistent with it. 40 C.F.R. § 131.12(a).[6]

The Act places upon the states primary responsibility to restore the integrity, the natural state, of the Nation's waters. Since many rivers flow across state lines, however, state lines must not stand as artificial barriers to this goal, as would occur if dischargers were able to achieve their desired level of water quality by violating the water quality standards of downstream states. As recognized by both EPA and the court of appeals in this proceeding, the Act insures that this does not happen by requiring that dischargers unequivocally comply with EPA-approved water quality standards of affected downstream states. CWA § 301(b)(1)(C). First Order on Petition For Review (EPA), P.A. 115a-121a, Court of Appeals, P.A. 29a-43a.[7]

This proceeding. Fayetteville operated a waste water treatment plant, constructed in 1969, which discharged all its effluent into the White River in Arkansas. This discharge over the years contributed to water quality problems, particularly algae growth due to the release of

[5] EPA requires states to "maintain and preserve" these waters. *Id.* at § 131.12(a)(3). Until 1983, EPA regulations provided that "no degradation" would be permitted in an ONRW. The language was changed in 1983 to permit temporary activities such as construction projects. EPA intends through the amended language to continue the prohibition of *any* degradation of these waters by a point source or other permanent source. 48 Fed. Reg. 51,399, 51,403 (1983).

[6] EPA also requires that each state insure that its standards provide for the "attainment and maintenance of water quality standards of downstream waters." *Id.* at § 131.10(b). The converse is not true: Downstream states need not lower their standards to accommodate upstream states.

[7] In this brief, the Appendix to the Petition for Writ of Certiorari will be cited "P.A.", the Joint Appendix cited as "J.A.", and individual exhibits to the administrative proceeding by index number, as listed in the Joint Appendix, e.g., "R., OK-5."

phosphorous and other nutrients. Rejecting the alternative of land application, which would not impact on the quality of any river, Fayetteville decided to build a new treatment plant.

Arkansas' 1981 Water Quality Standards required a dissolved oxygen concentration of only 4.0 milligrams per liter for an effluent dominated river like the White River. That standard would probably be met if all of Fayetteville's effluent from the new plant were discharged to the White River. In 1984 the State of Arkansas proposed upgrading this standard to 6.0 milligrams per liter. That revised standard would be violated if all the effluent from the new plant were discharged to the White River. R., B-10, 2 NPDES Permit Administrative Record (hereinafter, NPDES Adm. Rec.) 3942-45. Even though the new plant incorporated upgraded technology, Fayetteville's split flow proposal originated in its own recognition that the effluent would contain such quantities of pollutants as to violate water quality standards in the White River.

Fayetteville sought, and eventually obtained, an NPDES permit to ship half of the new plant's total effluent to the Illinois River, up to 6.1 million gallons a day. J.A. 66, 84. The effluent is transported via a series of tributaries and reaches the Illinois River about twenty-two miles upstream from the Oklahoma state line. The River then flows into Oklahoma, crossing the state line at a small lake, Lake Frances—a shallow flow-through reservoir—from which it then flows in a southerly direction to Tenkiller Ferry Reservoir (Lake Tenkiller), below Tahlequah, Oklahoma.[8] Arkansas' water quality standards for the Illinois River, as recognized by the EPA, "do not contain a prohibition against new or increased point source discharges." R., B-10, 2 NPDES

[8] Due largely to increasing algae growth since the time of the permit proceedings, Lake Frances' capacity to act as a reservoir of any kind has been virtually eliminated.

Adm. Rec. 482. The River thus provides Fayetteville a conduit whereby it discharges without violating Arkansas' standards.

But although a state designated scenic river, for which EPA had approved standards requiring the highest level of protection, the Illinois River in Oklahoma was degraded, even before EPA permitted the new discharge. P.A. 55a-65a. When Fayetteville sought a construction grant for the new plant, it advised the EPA of the River's already degraded condition:

> [T]he stream is not a pristine body of water; nutrient loadings from nonpoint sources and municipal discharges do adversely impact the Illinois River under present conditions, giving rise to high algae productivity and some dissolved oxygen problems.
>
> . . .
>
> [L]ake Frances, a shallow flow-through reservoir, is highly eutrophic, as evidenced by extensive growths of macrophytes and filamentous algae. . . . [B]ased on the information so far available, it does not appear to act as an effective nutrient trap. . . . The data suggest that the Lake receives very high loadings of both nitrogen and phosphorous and, further, that these nutrients are flushed through the Lake before complete biological uptake can occur.
>
> . . .
>
> Ultimately, the nutrients and the nutrient-stimulated organic matter is washed downstream [from the Illinois River Basin of Arkansas], where it enriches the Illinois River in Oklahoma. This results in deterioration of stream quality in Oklahoma.

201 Facilities Plan Environmental Information Document for the City of Fayetteville (January 1984) (hereinafter, Fayetteville Environmental Information Document), R. Ark.-6, pp. 2-20, 2-22, 2-28. Fayetteville then advised the EPA of the consequences if it obtained permission to discharge into the Illinois River:

> The total nutrient loading to Oklahoma would increase, either directly or through scour of enriched sediments.
>
> . . .
>
> These changes would be considered *degradation* of water quality *and would not be consistent with Oklahoma nutrient standards.*

Id. at 4-13, 4-14 (emphasis added).

To Oklahoma, the Illinois is a very special river. Oklahoma has "long recognized the Illinois River as a water course of unique natural beauty." R., B-37, ¶ 16.[9] In 1970, Oklahoma designated it one of five scenic rivers that "possess[es] . . . unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the State." OKLA. STAT. tit. 82, § 1452(a) (1981). Congress has designated the River as a potential Wild and

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[9] In 1952, the Oklahoma Fisheries Research Laboratory described the Illinois River as follows:

> Any description of the Illinois River should properly be filled with glowing adjectives . . . for the "Illinois" is a clear, spring-fed stream, flowing through the oak and hickory clad Ozark Hills in a succession of sparkling ripples and along, quiet pools, which inspires cries of "Eureka!" when first viewed . . .

R., B-10, 9 NPDES Adm. Rec. 3,921.

The U.S. Department of Interior in its 1979 study on the Illinois River's potential designation as a national Wild and Scenic River, found:

> Picturesque bluffs abut the river over much of its course, affording the user much scenic variety. The pastoral setting of an agricultural valley adds to the recreation enjoyment. Water quality continues to support a diverse fishery, although deteriorated from past years. Characteristic water clarity is one of the stream's most attractive attributes.

U.S. Department of the Interior, Illinois Wild & Scenic River Study (Final Report, 1979), p. 31. As indicated here, the quality had deteriorated from that previously observed, and as recognized by both Fayetteville and Oklahoma, had deteriorated at increasing levels in recent years.

Scenic River under federal law. 16 U.S.C. §§ 1271, 1276 (40) (1988).

As required by the Act, Oklahoma has adopted water quality standards for the scenic Illinois River. Two are particularly relevant here, because they set the highest applicable standards. First, unlike Arkansas, which permits additional discharge loading into the River, Oklahoma has adopted a "beneficial use limitation" which provides:

> All streams and bodies designated as (a) [which include state-designated scenic rivers] are protected by prohibition of *any* new point source discharges of wastes, or increased load from an existing point source except under conditions described in Section 3.[10]

§ 5, Oklahoma Water Quality Standards (OWQS), J.A. 46-47. (emphasis added)

Second, Oklahoma has extended to the Illinois River the highest of the three tiers of protection under its antidegradation policy:

> No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include [rivers] . . . designated "Scenic Rivers." [11]

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[10] Section 3 is Oklahoma's EPA-approved antidegradation policy. J.A. 27. Since no degradation at all is permitted in the quality of a scenic river, no increased load or new discharge from a point source could ever be permitted that degraded such a river. P.A. 47a-48a.

[11] The Illinois River is designated a scenic river above the 650 foot elevation level of Tenkiller reservoir to the Arkansas state line. The scenic portion covers virtually the entire stretch of river between Lake Frances and Lake Tenkiller. Hereinafter, "Illinois River" will refer to the portion classified as scenic and protected under the beneficial use limitation and "no degradation" standards.

§ 3, OWQS, J.A. 28. These standards were included in the 1982 standards that EPA approved for Oklahoma under CWA § 303.[12]

EPA issued its NPDES permit to Fayetteville on November 5, 1985, to become effective on December 10, 1985. Oklahoma and Save The Illinois River (S.T.I.R.) promptly requested an evidentiary hearing. The hearing was held August 18-20, 1987. The EPA Administrative Law Judge (ALJ) issued his initial order on January 12, 1988. He held that permits affecting downstream waters would be granted unless there was an "undue impact" on those waters, and that the EPA-approved water quality standards were only "relevant" to the issue of whether a discharge would have such an impact. P.A. 100a-104a. He upheld the permit because in his opinion there would not be an "undue" or "significant" impact on Oklahoma water quality. P.A. 105a.

On appeal, the EPA Chief Judicial Officer (CJO) found that the ALJ committed reversible error by employing an improper legal standard. He found the "plain and straightforward" language of § 301(b)(1)(C) required "unequivocal compliance" with applicable water quality standards and made no exceptions for cost or technological feasibility. P.A. 117a. He remanded for a simple determination of whether there was a detectable violation of the Oklahoma standards:

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[12] These standards are of course equally binding upon any discharges from point sources in Oklahoma, and represent Oklahoma's compliance with its duties under the Act to protect all waters within the State. The EPA Administrative Law Judge expressly found that the Oklahoma Water Quality Standards "do not amount to an attempt to establish a separate system for out-of-state sources since they apply equally to Oklahoma sources." P.A. 125a. EPA has never questioned Oklahoma's designation of the Illinois River as an ONRW, and has advised the states that rivers eligible for inclusion as federal Wild and Scenic Rivers, such as the Illinois, should be so designated. *E.g.*, EPA Region I, Guidance for Antidegradation Policy Implementation for High Quality Waters, p. 2 (March 10, 1986).

> It would be improper, however, to characterize the required showing as implying the existence of either an "undue impact" or "de minimis" test. The phrase "undue impact" wrongly implies a reasonableness standard, i.e., that violations of water quality standards may be tolerated if justified by the totality of the circumstances. The phrase "de minimis" incorrectly suggests that only "significant" violations are prohibited.

P.A. 118a.

On remand, the ALJ found that the Fayetteville plant would initially discharge thirty pounds a day of nutrients, especially phosphorous, into the Illinois River, increasing to fifty pounds a day as the plant reached design capacity. P.A. 128a. Of this increased pollutant load of eleven thousand to eighteen thousand pounds a year, twenty to twenty-five percent would be bioavailable, i.e., available as a food for algae, in Oklahoma. *Id.* at 129a.[13] Nevertheless, he refused to void the permit. According to the ALJ, a violation of the beneficial use limitation standard could occur only if the addition of pollutants would "create a nuisance or render the Illinois River in Oklahoma harmful, detremental [sic] or injurious to any beneficial use of the river." P.A. 126a-127a. He believed that a "mere measurable increase alone" in phosphorous or nitrogen was not enough to show a violation of the nutrients standard, absent a showing that it would cause a change in algae growth or some other parameter. *Id.* at 131a. Finally, he found that dissolved oxygen violations were already occurring, but did not find

[13] The courts have recognized the intrinsically harmful effects of nutrients such as phosphorous and nitrogen. "[N]itrogen and phosphorous compounds . . . provide food for many species of algae. Excessive nutrient levels degrade water quality both because the proliferation of algae is itself a nuisance and because algae respiration and subsequent death and decay use up oxygen dissolved in the river's waters." *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 575 (D.C. Cir. 1980).

the frequency of these violations would increase "solely" due to the new discharge. P.A. 140a.[14] He failed to discuss the antidegradation standard. The CJO affirmed, finding it was necessary to show a new degradation caused by a change in some water quality parameter such as nutrients. P.A. 152a.

The Tenth Circuit reversed EPA's issuance of the permit to Fayetteville, insofar as the permit authorized a discharge that would reach the Illinois River. The court found that EPA's ruling was defective because it utterly failed to consider an important aspect of the problem, the existing degradation of the River in Oklahoma. EPA's application of Oklahoma's standards to permit additional quantities of pollutants to reach a river already degraded by those same pollutants undermined the Clean Water Act:

> If we were to accept this logic, once water quality standards in a stream were violated, additional new discharges might be permitted indefinitely so long as each one would have an unmeasurable individual impact. The absurdity of such a policy is manifest.

Id. at 78a.

Accordingly, the Tenth Circuit ruled that if a river protected by the beneficial use limitation and the highest standard of the antidegradation policy, was already degraded, there was no need to show that a proposed additional discharge would create a new adverse impact, as long as the new discharge included the same pollutants that had contributed to the existing degraded condition. P.A. 79a. In the face of the EPA's finding that up to a fourth of the phosphorous and other nutrients discharged to the Illinois River would be available as algae food in

[14] The ALJ assumed that Oklahoma would be protected by a permit provision requiring modification in light of the findings of an ongoing Arkansas/Oklahoma/EPA study of pollution in the Illinois River. P.A. 143a. Now, more than five years after the permit was issued, the study, although completed, has not been released.

Oklahoma, and the unrefuted evidence (including photographs and Fayetteville's own analysis) that the added discharge would reach an already degraded river, the court concluded that Fayetteville's permit did not insure compliance with Oklahoma's water quality standards, and was therefore unlawful under CWA § 301.

SUMMARY OF THE ARGUMENT

The Clean Water Act's goals are the elimination of the discharge of pollutants, and the restoration of the Nation's waters to their natural state. Congress presumed that any discharge of pollutants, defined broadly to include industrial and municipal waste, was inherently harmful. Accordingly, Congress imposed a nationwide prohibition on the discharge of all pollutants, unless the applicant could prove through a permit process that its discharge would implement state-adopted, EPA-approved water quality standards. It is with respect to the protection of rivers like the Illinois River, outstanding national resource waters, that the statutory mission is most precisely focused, as EPA requires states to adopt standards that, at a minimum, permit *no* degradation of such rivers.

In this permit proceeding, EPA utterly failed to consider an important aspect of the decision as to whether Oklahoma's EPA-approved standards allowed an entirely new point source discharge of waste to enter the Illinois River: that the River was already degraded even before the addition of new waste from Fayetteville. Due to this critical error, EPA provided in this case an interpretation of Oklahoma's standards that allowed a new discharge of harmful waste into the River, even of the same type that had contributed to the existing degradation, as long as the new addition of pollutants did not in itself cause a measurable adverse impact in some other water quality parameter. The Tenth Circuit recognized that this interpretation of the Oklahoma standards

would run counter to the entire purpose of the Clean Water Act, expressed in both the statutory language and legislative history. EPA's interpretation would encourage backsliding, forcing Oklahoma—and the Nation—into a position of retreat within a statutory framework aimed at preserving and improving the Nation's waters.

The Tenth Circuit developed the correct legal standard that EPA should have applied to the Fayetteville permit application. Consistent with the approach that EPA has urged upon federal courts to determine the meaning of water quality standards, the Tenth Circuit examined the text of Oklahoma's standards, found Oklahoma's interpretation of the standards consistent with the language, and then found this interpretation further confirmed by EPA's regulations setting minimum requirements for each state's antidegradation standard, as well as by EPA's application of the standards to prohibit any increased discharge to the Illinois River from a point source located in Oklahoma. Further, EPA had advised the states that the antidegradation standard for outstanding national resource waters specifically prohibited *any* new point source discharge. If anything, the Tenth Circuit *narrowed* its application of the standards as compared to the meaning previously provided by EPA. While EPA's interpretation would prohibit all new point source discharges of waste to an outstanding national resource water under all circumstances, the Tenth Circuit applied the standard to the limited situation where the waters were previously degraded, and the additional pollutants were of the same type that had contributed to its degraded condition. In the face of unrefuted evidence of the Illinois River's degraded condition, and the agency's finding that up to one fourth of the phosphorous discharged into the River would be available as algae food in Oklahoma, the Tenth Circuit correctly found the permit did not insure compliance with Oklahoma's EPA-approved standards, and was therefore unlawful under the Clean Water Act.

ARGUMENT

I. EPA FAILED TO CONSIDER THE CURRENTLY DEGRADED STATUS OF THE ILLINOIS RIVER IN ITS APPLICATION OF THE OKLAHOMA STANDARDS TO THE FAYETTEVILLE NPDES PROCEEDING, AND AS A RESULT OF THIS FAILURE, EPA ADOPTED AN UNREASONABLE INTERPRETATION THAT WAS PROPERLY SET ASIDE BY THE TENTH CIRCUIT.

EPA's interpretation of the Oklahoma standards at issue here is analogous to forcing a child who is vulnerable to infection from a particular bacteria, and has been and is currently infected by that bacteria, to absorb additional quantities of that bacteria until such time as his temperature increases or he becomes "measurably" more sick in some way. Addressing only whether the new pollutants would result in a new harmful impact in some water quality parameter, the EPA totally ignored the unrefuted evidence that the Illinois River was already degraded, and that the additional pollutants from Fayetteville were of the same type that contributed to its degraded condition in the first place. EPA's interpretation of Oklahoma's EPA-approved standards was unreasonable as a matter of law, because it fundamentally violated the statutory objectives of the Clean Water Act—restoring and improving the quality of our waters—as well as the role intended for the antidegradation policy in achieving those goals.

A. The Clean Water Act Requires Compliance With Federally-Approved Water Quality Standards of Downstream States.

In adopting the Clean Water Act, Congress set forth in clear terms its purpose to achieve the complete elimination of the discharge of pollutants into the navigable waters. The sponsors succeeded in including this goal, despite strong objections. *See National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 179-81 (D.C. Cir. 1982). Even

the statutory language setting forth the goal of restoring the Nation's waters to their chemical, physical, and biological integrity was harshly attacked by critics, who urged that the natural state of our waters should not be pursued as a goal for its own sake, but rather that the aim of the statute should focus narrowly on the achievement of beneficial uses where economically feasible. Letter from W. Ruckelshaus, December 31, 1971, *reprinted in* 1 1972 LEGIS. HIST. 834, 835. Still, the sponsors prevailed and Congress enacted a comprehensive program for the "*elimination* of water pollution." *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (emphasis added).

In the case of permit applicants whose discharges would reach other states, both Congress and EPA have recognized that the Act's objectives would be frustrated if dischargers were permitted to export their pollution across state lines and violate the water quality standards of downstream states. The critical substantive provision of the Clean Water Act, relevant here, is § 301(b)(1)(C), which states:

> [T]here shall be achieved—
>
> . . .
>
> any more stringent limitation . . . *required to implement* any applicable water quality standard established pursuant to this chapter. (emphasis added).

This substantive provision requires compliance with EPA-approved standards of source *and* downstream states. So important is it that this substantive provision be given effect, Congress and EPA have also provided additional procedural safeguards to insure compliance with EPA-approved water quality standards of downstream states. When EPA is the permitting authority, as was the case here, the statute requires the source state to certify that the discharge will comply with all applicable state water quality standards approved by EPA. CWA § 401(a)(1). Even if a state provides certifica-

tion, the EPA must notify a downstream state, whose water quality may be affected, and, if the downstream state requires, a hearing is held after which the EPA "*shall* condition . . . [the] permit in such manner as may be necessary to *insure compliance* with applicable water quality requirements. If the imposition of conditions cannot *insure* such compliance, [the EPA] *shall* not issue such license or permit." CWA § 401(a)(2) (emphasis added). EPA has also adopted implementing regulations prohibiting the issuance of any NPDES permit where conditions cannot *insure* compliance with applicable water quality requirements *of all affected states*. 40 C.F.R. § 122.4(d).[15]

Arkansas' argument, that the only role for the downstream states is to consult with the permitting authority, ignores the statutory structure, as well as the indicators of statutory meaning contained in EPA's implementing regulations. These implementing regulations are entitled to weight under *Chevron, United States, Inc. v. Natural*

[15] Similarly, states which have NPDES permitting authority must insure compliance with federally-approved water quality standards of downstream states. The Act prohibits approval of a state permit program unless the state can assure compliance with all applicable standards including those under CWA §§ 301(b)(1)(C). CWA § 402(b)(1)(A). States the water quality of which may be impacted must be given notice and an opportunity for input, and if their proposals are not accepted by the source state, the EPA must be notified of the reasons. CWA § 402(b)(3), (5). Finally, even if a state decides to issue a permit, EPA may veto the permit and assume permitting authority if the state permit fails to assure compliance with applicable downstream standards, and thus falls outside the "guidelines and requirements" of the Act. CWA § 402(d)(2)(B). *See Champion Int'l Co. v. EPA*, 648 F.Supp. 1390 (W.D.N.C. 1986), *vacated on other grounds*, 850 F.2d 182 (4th Cir. 1988) (EPA objected to permit because it did not *unequivocally insure* compliance with narrative water quality standards of affected downstream state.). The regulation prohibiting NPDES permits, where conditions cannot assure compliance with applicable water quality standards of all affected states, also applies where states have permitting authority. 40 C.F.R. § 123.25(1), (15).

Resources Defense Council, Inc., 467 U.S. 837, 843-44, *reh'g denied*, 468 U.S. 1227 (1984).[16] As the Tenth Circuit recognized, Arkansas' interpretation would permit interstate water quality to be set at the lowest common denominator anytime the upstream source state had lower water quality standards than those deemed desirable by the downstream state, contrary to the purposes of the Act. P.A. 13a.[17] In fact, in this proceeding, water qual-

[16] Arkansas also relies on this Court's "undue impact" dicta in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), to support its argument. That case, however, dealt with a different issue: whether the Act preempts a nuisance suit brought against an out-of-state discharger under the nuisance laws of the downstream state. In holding that such common law nuisance suits were preempted by the Act, the Court found that plaintiffs in that case were attempting to set up a "second permit" system, which would disrupt the NPDES permit system established by the Act. *Id.* at 491. Oklahoma does not seek to circumvent the NPDES permit process, but to protect itself through it. The requirement that downstream states' EPA-approved water quality standards be enforced in the unitary NPDES permit process is entirely consistent with *Ouellette*.

Ouellette was decided January, 1987. In subsequent NPDES permit cases involving interstate waters, EPA adopted the position that *Ouellette* did not apply. *See* Joint Brief of EPA and State of Tennessee, pp. 48-50, *Champion Int'l Corp. v. EPA*, No. 87-3529 (4th Cir. 1988) (*Ouellette* "has no application to cases brought under the Clean Water Act," and North Carolina, the upstream state "continues to be required to assure compliance with Tennessee's Section 303 water quality standards."). In this proceeding, the EPA Chief Judicial Officer held the *Ouellette* "undue impact" dicta inapplicable, because it conflicted with the clear language of § 301(b)(1)(C). P.A. 118-119a. Before this Court, however, the government apparently seeks to resurrect *Ouellette* to argue that the Clean Water Act confers broad powers to the EPA to impose a *de minimis* standard on water quality violations, EPA Brief, pp. 17-18, 28-29, a position that finds no explicit support in the language of the Clean Water Act or its implementing regulations, and that was explicitly rejected by the EPA below. P.A. 118a.

[17] Water quality standards originated in the Water Quality Act of 1965. In that statute Congress required each state to promulgate standards for the "interstate waters or portions thereof within such state," *See* 33 U.S.C. § 1160(c)(1)(1970). Congress thereby

ity would be set at the lowest common denominator if Fayetteville did not have to comply with Oklahoma's federally-approved standards. Arkansas has not imposed a "no discharge" prohibition on the Illinois River in Arkansas. R., B-10, 2 NPDES Adm. Rec. 482. Arkansas has not designated the Illinois River as a scenic river or its equivalent, nor has the Arkansas segment been included as a potential national Wild and Scenic River. *Id.* at 3,941. And, while Arkansas has an antidegradation policy for the River, it provides only protection for existing uses:

> No point source discharge shall be permitted without taking into account the highest instream use of the existing stream and the need to protect existing uses of downstream waters.

Id. at 3,941.[18] The discharge of additional pollutants from Fayetteville would be permissible under the Arkansas standards as long as it did not threaten any "existing uses," even though it would violate Oklahoma's standards as soon as the state line was crossed, as Oklahoma's EPA-approved standards prohibit any degradation, regardless of whether an existing use is threatened.[19]

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recognized the particular need to protect water quality in the interstate context, where a downstream state's water quality would be impacted by an upstream discharge. A lowering of the quality of such waters to the lowest common standard was not to be tolerated:

> The Committee must reemphasize its intent that water quality standards are not designed to "lock in" present uses of water or to exclude others, not now possible. The standards are not a device to insure the lowest common denominator of water quality but to enhance the quality and productivity of our water resources. S. Rep. No. 10, 89th Cong., 1st Sess., p. 10, *reprinted in* SEN. RPTS., MISC. RPTS. ON PUBLIC BILLS, Vol. 1-1 (1965).

[18] *See* 40 C.F.R. § 131.10, which requires states to adopt standards which *insure the attainment* of the water quality standards of downstream states (not just their existing uses).

[19] There is no basis for Arkansas' apparent suggestion that § 303(d) of the Clean Water Act implicitly limits the role of EPA-approved state water quality standards to prevent further pollution

B. While EPA Recognized That A Discharger Must Comply With EPA-Approved Water Quality Standards of Downstream States to Carry Out The Purposes of the Clean Water Act, In This Case EPA Provided An Unreasonable Interpretation of the Oklahoma Standards That Undermined the Act's Objectives.

Under *Chevron*, a reviewing court must set aside an agency interpretation of a legal standard if it is arbitrary, capricious or manifestly contrary to the statute in view of its language or legislative history. *Chevron*, 467 U.S. at 844. The deference due an agency depends on how much discretion Congress intended the agency to have in resolving the particular type of decision before it. *E.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-12 (1971). In *Chevron*, for example, a case arising under the Clean Air Act, Congress had recognized, but had been unable to reconcile, two "manifestly competing" interests, the economic interest in business development and the environmental interest in improving air quality. The Court recognized that Congress' silence afforded the agency broad discretion to forge an "effective reconciliation of these twofold ends . . .". *Chevron*, 467 U.S. at 866, *citing United States v. Shimer*, 367 U.S. 374, 383 (1961).

Here, Congress has clearly spoken. Congress has evaluated the competing interests that arise in interstate water quality disputes, and has determined that when a discharger impacts upon the water quality of a downstream state, the permit must be prohibited unless compliance is *insured* with federally-approved water quality standards. As both EPA and the Tenth Circuit recognized, Con-

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of already degraded waters. While § 303(d) requires states to identify waters where water quality standards are not being achieved through technology-based limitations imposed on existing dischargers, the statute does not in any way purport to limit the application of any more stringent state water quality standard, which, once approved by EPA, must be enforced in individual permit proceedings.

gress has not authorized the permitting agencies to balance the affected interests or to impose a reasonableness test. *See Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977) (Clean Water Act is a "tough law that relie[s] on explicit mandates to a degree uncommon in legislation of this type."). The "thorough, probing, [and] in-depth review" required of agency action, *Overton Park*, 401 U.S. at 415, must focus on the issue of whether EPA fully considered all relevant information to determine whether Fayetteville should receive its permit, in view of the Act's objectives and the key role which the NPDES permit process plays in achieving those objectives.

EPA failed to consider an important aspect of its permit decision when it ignored the previously degraded condition of the Illinois River in Oklahoma. In a statutory framework aimed at the restoration of waters to their natural state, Congress has required that "pressure must be maintained to assure improved quality and to avoid slipping back." S. Rep. No. 370, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4326, 4367. The interpretation afforded by EPA in this proceeding would permit additions of harmful pollutants to reach the Illinois River, already degraded by those pollutants, as long as each addition was sufficiently "incremental" so as not to result in a discrete harmful impact on some measure of water quality. And, of course, as the total number of pollutants already present in a river increases, each new incremental addition of pollutants is less likely to have a demonstrable impact. *Compare* Prefiled Testimony of M. Schornick, R. OK-2, at 4 (Phosphorous loading to Lake Frances had increased 106% over 1974-1975 levels), *with* ALJ Decision on Remand, P.A. 129a (Fayetteville effluent would only increase phosphorous loading to Lake Frances by an additional 2.4%). Thus, under EPA's interpretation, the more polluted a river, the less likely a new discharge would be prohibited, because its discrete harmful effect would be less likely to be measured. This would exacerbate pollution, contrary to the intent of the Act and the regulatory framework.[20]

Fayetteville's discharge contained at least two pollutants, phosphorous and nitrogen, that were already adversely impacting the water quality of the Illinois River. P.A. 80a. Congress could not reasonably have intended the permitting authority to exclude from consideration the existing degraded condition of a scenic river, for which EPA has approved the highest protective standards, where additional pollutants would reach the river of the same kind that contributed to its degraded condition.[21]

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[20] Carried to its logical extreme, EPA's interpretation would place upon the permitting authority the almost impossible task of identifying in all circumstances precisely which point source put the river in a degraded condition, since, once it was degraded, additional point sources could be permitted indefinitely as long as the discharges were sufficiently incremental to avoid a discretely identifiable harmful impact. Such an interpretation would clearly frustrate the Act's objectives, particularly in regard to protection of outstanding national resource waters. Moreover, Congress recognized that there might be numerous factors contributing to the degraded condition of a body of water (including nonpoint sources), but Congress "[did] not consider this to be an acceptable excuse for point sources not meeting their individual requirements." H.R. Rep. No. 911, 92nd Cong., 2d Sess., *reprinted in* 1 1972 LEGIS. HIST. 753, 789.

[21] As recognized by the Tenth Circuit, EPA's hearing officer failed to consider another important aspect of the case, "the oxygen reducing effect of algae respiration and decay," and showed an incomplete understanding of phosphorous assimilation. P.A. 74a. The court quoted the ALJ's statements that "assimilative processes [at low flows] is at its [sic] most effective stage, and therefore removes more nutrients upon which the algae feed. . ." and that "additional assimilation of phosphorous takes place [below Lake Frances] . . ." P.A. 68 n. 47, *quoting* Order on Remand, P.A. 129a, 131a.

The Tenth Circuit noted that the "glaring error" of the ALJ's statement was that uptake of nutrients by algae was itself an "assimilative" process that did not reduce the potential for eutrophication, but was an additional step in the process. P.A. 68a n. 47. The Court concluded:

> These are grave misunderstandings because the phenomena of oxygen depletion, which results from "over-fertilization" of a

C. EPA's Interpretation Of The Oklahoma Standards Was Unreasonable Because The Clean Water Act Does Not Require A Showing Of Harm For A Discharge To Be Prohibited And EPA Failed To Provide Any Explanation As To Why In This Case Such A Showing Would Be Required.

EPA's application of the Oklahoma standards runs counter to the Clean Water Act's statutory and regulatory framework, which does not require that a discharge be proven harmful to fall within the Act's prohibitions. Rather, the Act presumes that the discharge of pollutants is inherently harmful, and thus prohibits all discharges unless compliance is assured with water quality standards through a permit process. In the statute, "pollution" means the "man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." CWA § 502(19). Pollutant is defined to include "industrial, municipal, and agricultural waste discharged into water . . .". CWA § 502(6). None of these terms has been defined in terms of harm to the environment, and substances are subject to the Act's prohibitions if they result in "man-made or man-induced alteration" of water, even where there is no knowledge that the substance is harmful, or where its effects are subject to uncertainty. *FMC Corp. v. Train*, 539 F.2d 973, 983 (4th Cir. 1976); *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 218 n. 151 (5th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S. Ct. 1936 (1990);[22] *cf. Hudson River Fishermen's*

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stream and the consequent increase in organic matter, and phosphorus uptake by aquatic organisms, are intrinsic to the eutrophication process.

Id. at 69a n. 47.

[22] The legislative history confirms Congress' conviction that the discharge of all pollutants was to be viewed as inherently harmful. In formulating the definition of "pollutant", Congress deliberately incorporated the applicable definition from the Refuse Act of 1899, S. Rep. No. 414, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3742. The Refuse Act prohibited the discharge of "any refuse matter of any kind or description whatsover other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water." 33 U.S.C. § 407 (1970). Congress recognized the value of a strong prohibition of all discharges: "The Committee believes it is important to clarify this point: No one has the right to pollute." S. Rep. No. 414, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3709, *cited in United States v. Hamel*, 551 F.2d 107, 110-11 (6th Cir. 1977).

Ass'n v. City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1990) (substance discharged into navigable water is a "pollutant" even when intended use is beneficial).

Consistent with its statutory goals, the Clean Water Act does not require a showing that a new discharge creates an incremental new harm in order to constitute a violation of the Act. *See, e.g., C. & H Sugar Co. v. EPA*, 553 F.2d 280, 289 (2d Cir. 1977) (effluent limitations, enforced in permit process, required removal of a "minute" quantity of a pollutant, even where there was no showing aquatic life was threatened); *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated*, 485 U.S. 931 (1988) (Clean Water Act makes no provision for "aggregative" standard or "rare" violations); *Student Pub. Interest Group v. P.D. Oil & Chem.*, 627 F. Supp. 1074, 1082 (D.N.J. 1986) ("[P]laintiffs are not required to show that a particular percentage of the pollution that affects their interests is traceable to defendant's effluent . . . [as] numerous polluters contribute to an environmental harm like pollution of rivers.")

In the face of the statute's presumption that the discharge of any pollutant is inherently harmful, EPA failed to provide any explanation of how it could construe Oklahoma's standards to permit the discharge of additional pollutants, *known to be harmful*, to waters that were, in fact, already harmed by those types of pollutants. EPA's error is even more pronounced in view of the information provided by EPA to the states about the pollutant phosphorous:

> Generally, it is recognized that phosphorus is not the sole cause of eutrophication but there is substantiating evidence that frequently it is the *key element* of all of the elements required by freshwater plants, and generally, *it is present in the least amount relative to need.* Therefore, an increase in phosphorus allows use of other already present nutrients for plant growth.
>
> Once nutrients are combined within the aquatic ecosystem, their removal is tedious and expensive. *Phosphates are used by algae and higher aquatic plants and may be stored in excess of use within the plant cell.* With decomposition of the plant cell, some phosphorus may be released immediately through bacterial action for recycling within the biotic community, while the remainder may be deposited with sediments.

EPA Quality Criteria for Water (1986), Phosphorus (emphasis added). That phosphorous may be "stored in excess of use" in itself raises a serious doubt as to whether the agency considered all relevant factors in its interpretation of Oklahoma's standards. As recognized by the EPA here, the observable harm caused by increased loading may not occur immediately, but may occur after the algae cells die and the previously stored phosphorous is recirculated throughout the aquatic system. Further, EPA had found that phosphorous availability was the controlling factor for algae growth in the Illinois River System, P.A. 131a, yet EPA failed to consider this factor in its interpretation of the applicable Oklahoma standards.

D. EPA's Interpretation Ignored The Importance Of The Antidegradation Standard For An Outstanding National Resource Water.

EPA's interpretation was also fundamentally flawed because it failed to consider the critical importance of Oklahoma's EPA-approved antidegradation standard applicable to the Illinois River. The ALJ failed to give any

independent significance to this standard in his Order on Remand.

The federal antidegradation policy dates back to 1968, when the Secretary of the Interior required states to adopt, as part of their water quality standards, a provision that "water whose existing quality is better than the established standards . . . will be maintained at their existing high quality." Compendium of Department of Interior Statements on Non-Degradation of Interstate Waters (Aug. 1968). In 1975, EPA adopted regulations, requiring states, *at a minimum*, to provide a three-tier policy, under which *no degradation* would be allowed of high quality waters which constitute an outstanding national resource. 40 Fed. Reg. 55,334, 55,336 (1975). EPA has advised the states that the purpose of the antidegradation standard is to maintain water quality "and *prevent backsliding.*" Questions and Answers on Water Quality Standards, July 12, 1979, *reprinted in* ENV'T RPTR. (BNA) 31:5152. And in 1983, EPA rejected a proposed rule that would have weakened the mandatory antidegradation policy by imposing a cost-benefit test and by limiting the policy's protection to existing uses, even for outstanding national resource waters. In response to sharp criticism, EPA retained the existing policy and reaffirmed the special protection afforded outstanding national resource waters:

> Finally, § 131.23(a)(3) [the predecessor to 40 C.F.R. § 131.12(a)(3)] provides special protection of waters for which the ordinary use classifications and water quality criteria do not suffice, denoted "outstanding National resource water." Ordinarily most people view this subsection as protecting and maintaining the highest quality waters of the United States: that is clearly the thrust of the provision. It does, however, also offer special protection for waters of "ecological significance."

48 Fed. Reg. 51,399, 51,403 (1983).

Congress has been particularly concerned about the dangers of falling back, or backsliding, from progress made toward the realization of the Act's objectives, and has focused on the antidegradation policy as key to protecting those gains. In 1987, Congress enacted an anti-backsliding amendment which provided that where a state had achieved water quality in excess of that needed to protect designated uses, adjustments could be made to waste load allocations *only* if the revision was consistent with the state's approved antidegradation policy. CWA § 303(d)(4)(B). Describing the antidegradation policy as a "cornerstone" of the entire statute, Congress stated:

> The principal objective of the Act is the restoration and maintenance of the integrity of our Nation's waters. *Every requirement of the statute looks toward cleaner water—never backward toward relinquishing pollution co[illegible] gains that contribute to meeting that objective* [illegible]ainment and maintenance of clean water will not [illegible]chieved if it is permitted to be degraded without compelling and overriding reasons. Moreover, if the Act is to accomplish its objectives, *the high quality of waters considered to be outstanding national resources must be preserved.*

S. Rep. No. 50, 99th Cong., 1st Sess. (1985), *reprinted in* 2 Sen. Comm. on Public Works, 100th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, 1425-1426 (1988). (emphasis added).

Without the highest antidegradation requirement for rivers protected as outstanding national resource waters, pollution would be permissible until its cumulative effect reduced the quality of a given body of water below the standards that must be enforced under the Act. In this case, EPA adopted an interpretation that permits backsliding, as additional quantities of known pollutants would be allowed, indefinitely, into a previously degraded river until the cumulative impact were such as to contribute to another incremental quantum of measurable degradation. Such an aggregative approach to the standard would directly undermine the purpose of the standard, to insure that every step is a step forward.[23]

II. THE TENTH CIRCUIT FORMULATED THE CORRECT STANDARD TO DETERMINE WHETHER FAYETTEVILLE'S PERMIT TO DISCHARGE INTO THE ILLINOIS RIVER WOULD COMPLY WITH OKLAHOMA'S WATER QUALITY STANDARDS.

The Tenth Circuit applied a correct standard to determine whether the Fayetteville discharge insured compliance with Oklahoma's standards. The Court found that

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[23] EPA has apparently failed to recognize in this proceeding that the applicable Oklahoma standards insure protection of water quality above that necessary to preserve any designated use. In its early comments on Fayetteville's proposal, EPA acknowledged that the standards prohibited any new point source discharge to the Illinois River, but, apparently failing to grasp the significance, concluded "there would not be an adverse impact on designated uses in either state." 2 NPDES Adm. Rec. 482, R. B-10. At the hearing, Fayetteville witness Thompson acknowledged that the increased phosphorous load to the Illinois River would violate Oklahoma's beneficial use limitation standard, even if no designated use were threatened. R. C-1, pp. 245-247, P.A. 65a. And Fayetteville's Environmental Information Document acknowledged that the discharge would further degrade the River. R., Ark.-6, p. 4-14. Nevertheless, when formulating his legal standard, the ALJ required Oklahoma to show that the discharge would "create a nuisance" or render the River "harmful, detremental [sic], or injurious to any beneficial use. . ." P.A. 126a-127a.

The commentators have cautioned against an approach which links the protection of the antidegradation policy with impact on existing uses: "A use oriented policy . . . could produce significant degradation of waters . . . EPA additionally would have to base a use-oriented policy on the rather questionable science that attempts to determine the levels of pollution that are acceptable to an aquatic ecosystem. Scientific knowledge, while appropriate to mandate existing restrictions, is too uncertain to warrant relaxation of requirements because the water is 'clean enough'." Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND L. REV. 1167, 1192-93 (1983).

for rivers protected by Oklahoma's beneficial use limitation and antidegradation standard prohibiting any degradation, there must be a detectable change in water quality for that water to qualify as degraded. But once the quality of the receiving stream was degraded, it was not necessary to prove that the incremental impact of a proposed additional discharge must itself be detectable. "Rather, if a body of water is experiencing [water quality standards] violations and a proposed new source would discharge the same pollutants to which those standards apply, that source may not be permitted if its effluent [would] reach the degraded waters." P.A. 79a-80a. The legal standard formulated by the Tenth Circuit did not originate in its own interpretation of what the standard should be. Rather, applying a test urged on the courts by EPA in previous cases, the court examined (1) Oklahoma's interpretation of the standards in light of their plain meaning; (2) EPA's previous interpretations of the standards as applied to other dischargers on the Illinois River; and (3) EPA's regulations describing the minimum requirements for each state's antidegradation policy. These sources were consistent with each other and confirmed Oklahoma's interpretation that the discharge would violate its EPA-approved standards. This interpretation is clearly confirmed by EPA's instructions to the states on how to implement the antidegradation policy for outstanding national resource waters, and also clearly confirmed by EPA's internal legal analysis of the meaning of the standard. EPA's assertion that the interpretation of Oklahoma's water quality standards, proffered by a hearing officer in 1987, "*presumably*" reflects the interpretation that EPA would have been provided five years previously when approval was granted, EPA Br. pp. 19-20, ignores the *actual* interpretations of those standards that had been previously provided by EPA.

In other cases, EPA has suggested the proper analytical framework to determine the meaning of a water

quality standard. In *Champion*, EPA found that a permit sought by a North Carolina facility to discharge into the Pigeon River, about twenty-six miles upstream from the Tennessee border, would violate Tennessee's EPA-approved color standard for the river. The Tennessee standard was a narrative standard. EPA looked to Tennessee's interpretation of its standard, and advised the District Court:

> *As the party best able to interpret and apply its own standards, Tennessee's views of what permit conditions are necessary to meet Tennessee law deserve deference from North Carolina, EPA and this court.* Tennessee's legal analysis is entitled to substantial deference, and its factual determinations concerning the permit limits necessary to meet its standards should be accepted unless arbitrary and capricious. *Udall v. Tallman*, 380 U.S. 1 (1965).

Motion of EPA for Summary Judgment, *Champion International, Inc. v. EPA*, Civ. No. A-C-86-26 (W.D. N.C.), filed October 16, 1986, p. 51 n. 22. (emphasis added). Since Tennessee's interpretation of its standard was consistent with EPA regulations and guidelines, EPA urged the Court to accept it. *Id.* at 51-52.[24]

A. Oklahoma Has Interpreted Its Standards In This Proceeding To Prohibit Any Addition of Pollutants to the Illinois River.

Oklahoma's beneficial use limitation standard was included in the first water quality standards adopted after the passage of the 1972 amendments to the Clean Water

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[24] In *Navistar Int'l Transp. Corp. v. EPA*, 858 F.2d 282, 287-88 (6th Cir. 1988), *cert. denied*, 490 U.S. 1039 (1989), EPA faced the similar question of interpreting the meaning of a state air quality standard enforceable under the federal Clean Air Act. Consistent with EPA's approach in *Champion*, the agency examined the testimony of the state government official who drafted the state standard, and found his views consistent with both the standard's plain language and the statute's goal of reducing pollution.

Act, and has been included in every triennial revision of those standards since then.[25] Statement of L. Edmison, Addendum to R., B-83. The limitation was applied to new or additional point source discharges that reached the Illinois River, whether originating on the River or on a tributary that flowed into the protected part of the River. In 1982, Oklahoma's Pollution Control Coordinating Board advised Fayetteville that the Illinois River was degraded, and that the new proposed discharge would constitute a violation of the beneficial use limitation standard approved for the River. R. B-10, 7 NPDES Adm. Rec. 2,969. Oklahoma consistently has interpreted the beneficial use limitation standard to prohibit the Fayetteville discharge.

Oklahoma's antidegradation policy has also been included in every submission of water quality standards to the EPA, and prohibits any degradation of outstanding national resource waters, including state-designated scenic rivers such as the Illinois River.[26] Oklahoma advised EPA on August 7, 1985, of reports that the water quality on the River had been degrading at an "alarming rate" over the past decade, and that Fayetteville's own assessment of the impact of its discharge on the River showed that

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[25] The 1973 language provided that "a" streams were protected from "any future discharge of pollutants." Because this language could be interpreted to ban even existing discharges, the language was modified in 1976 to accomplish the intent of prohibiting "a new point source discharge of wastes or increased load from an existing point source." Addendum to R., B-83.

[26] Until 1976, Oklahoma's antidegradation standard required maintenance of the high quality of waters where quality exceeded that necessary to preserve designated uses, unless limited degradation were demonstrated to be necessary for economic development. Oklahoma has never permitted any point source degradation of the Illinois River on these grounds. In 1976, the language was changed to the current form, permitting *no degradation* of high quality outstanding resource waters.

the "*resulting changes would be considered degradation and would not be consistent with the Oklahoma nutrients standards.*" R., B-10, 2 NPDES Adm. Rec. 692 (emphasis added). When Oklahoma requested its evidentiary hearing on December 10, 1985, it again advised EPA that any discharge that reached the Illinois River would violate the antidegradation standard. R., B-2. On September 15, 1986, EPA approved Oklahoma's 1985 water quality standards, containing the same antidegradation standard for the Illinois River that had been included in the 1982 standards. Although Oklahoma had advised EPA that it interpreted its antidegradation standard to prohibit the Fayetteville discharge, EPA did not question that interpretation when it approved the standards in 1986. R., EPA-6. The Tenth Circuit found Oklahoma's interpretation of its standards further confirmed by their plain meaning. P.A. 47a-48a.[1] The 1982 beneficial use limitation standard for scenic rivers prohibits "any new point source discharge of waste[s] . . . except under conditions described in Section 3." J.A. 46. Section 3, the Oklahoma Antidegradation Policy, provides "[n]o degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance [including scenic rivers]." J.A. 28.[27]

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[27] The EPA's error would not have been cured had the 1985 water quality standards been applicable. The 1985 standards prohibited any new or increased point source discharge which "increase[d] pollutant loading." OWQS § 7.11 (1985). Although pollutant loading is not a defined term, "pollution" is defined in the Oklahoma standards to include "contamination or other alteration of the physical, chemical, or biological properties of any natural waters of the State. . .". Under the Oklahoma standards, as under the Clean Water Act, there is no required showing that a substance be harmful to fall within these statutory definitions, as long as its discharge results in a "man-induced alteration of the receiving stream." *FMC Corp. v. Train*, 539 F.2d 973, 983 (4th Cir. 1976).

B. Oklahoma's Interpretation Was Confirmed By EPA's Application of the Standards To An Oklahoma-based Discharger To The Illinois River.

As the Tenth Circuit recognized, Oklahoma's interpretation of its beneficial use standard was consistent with an earlier interpretation of that same standard by EPA as applied to the Tahlequah, Oklahoma waste water treatment plant. P.A. 51a n. 37. The record contains a letter from Lawrence R. Edmison, Director of the Oklahoma Department of Pollution Control, to EPA, confirming a conversation regarding possible revisions to Oklahoma's Waste Water Quality Management Plan for Tahlequah: "Based on *our understanding* that Tahlequah's discharge *must not increase* loading on the Illinois River which does carry the "a" designation, we hereby submit further revisions to Tahlequah's proposed effluent limits." Addendum to R., OK-4 (emphasis added). An earlier memorandum to Mr. Edmison from Quang Pham, of the Oklahoma State Department of Health, stated that since the time Tahlequah had first sought permission to increase its load, it had been determined that Tahlequah Creek, the receiving stream for the discharge, was a tributary of the Upper Illinois River above the six hundred and fifty foot elevation. Because this portion of the River was protected by Oklahoma's "a" designation, "*EPA indicated that no load increase would be allowed for Tahlequah.*" *Id.* (emphasis added).[28]

The interpretation of this standard sought by Oklahoma for the Fayetteville discharge is identical to the interpretation EPA had given to that same standard as applied to Tahlequah in 1986.

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[28] The issue of how the beneficial use "a" designation applied to Tahlequah originated in uncertainty as to whether the receiving stream from that discharge flowed into a portion of the Illinois River above the six hundred fifty foot elevation. When a survey showed that the tributary was above the 650 foot elevation, both Oklahoma and EPA agreed that the beneficial use limitation prohibited any increased discharge of waste from Tahlequah. Addendum to R., B-83.

C. Oklahoma's Interpretation Of Its Antidegradation Standard Is Consistent With the Interpretation That EPA Has Provided For That Standard.

In recognition of the key role of the antidegradation policy in preserving outstanding national resource waters, EPA has adopted regulations that at "a minimum" require each state to "maintain and preserve" such waters. 40 C.FR.. § 131.12(a)(3). The Tenth Circuit found the plain language interpretation of the Oklahoma standards, to allow "no degradation" of scenic river water quality through the introduction of additional pollutants, to be consistent with these minimum guidelines. P.A. 48a n. 34.

That the antidegradation standard prohibits new discharges to the Illinois River is further confirmed by the instructions that EPA has given to the states—in question and answer format—on how to implement the policy. These instructions included the following:

> In High Quality Waters, Are New Dischargers Or Expansion of Existing Facilities Subject to the Provisions of Antidegradation?
>
> Yes. Since such activities would presumably lower water quality, they would not be permissible unless the State finds that it is necessary to accommodate important economic or social development.

EPA, Questions and Answers on Antidegradation (Aug. 1985), p. 6. Since Oklahoma classifies the Illinois River as an outstanding resource water, no additional discharges would be allowed under EPA's guidelines, even to accommodate economic or social development. 40 C.F.R. § 131.12(a)(3). EPA's 1985 instructions were consistent with earlier guidelines in which EPA advised the states of techniques available to implement the policy, including "[r]estricting *any new discharge of pollutants from new and existing sources.*" Chapter 5 Water Quality Standards, 41 Fed. Reg. 47,777 (1976) *reprinted in* ENV'T RPTR. (BNA) 31:5121, 5126 (May 11, 1979) (emphasis added). Such implementing regulations are

indications of the meaning to be given to the standards. *E.I. DuPont DeNemours & Co. v. Train*, 430 U.S. 112, 135 n.25 (1977).

These instructions to the states also reflect EPA's internal understanding of the application of the antidegradation standard to outstanding national resource waters. In 1979, the Director of the EPA's Water Criteria and Standards Division asked the EPA General Counsel's office whether, in the event states failed to promulgate standards to protect an ONRW, EPA had the legal authority to promulgate such a standard. The response of the agency's counsel is highly instructive:

> Assuming a State has adopted an ONRW, you ask if EPA has authority to promulgate a water quality standard to protect the ONRW's status. We are not sure why *any* water quality standard would be necessary for an ONRW, since the standard is *no* degradation; it would seem that arguments over *x* or *y* micrograms per cubic meter would be irrelevant. Whenever a new point source applied for a permit to discharge into an ONRW, we could simply deny the permit (or force the State to deny the permit through our veto power) under § 301(b)(1)(C), which requires compliance with all State laws.

EPA, Memorandum from J. Rogers, Associate General Counsel, Water and Solid Waste Division to K. Mackenthun, Director, Criteria and Standards Division (August 15, 1979), p. 4 (emphasis in original). The legal memorandum drew a distinction between the Clean Air Act, which prohibited only "significant" deterioration, and the Clean Water Act, where *no* degradation meant no new point source discharges of pollutants.[29] As an agency

[29] The same memorandum confirmed that the States, not EPA, had responsibility to designate outstanding national resource waters, an interpretation that has been recently affirmed. Memorandum from C. Winer, Attorney, Water Division, to W. Diamond, Director, Criteria and Standards Division (May 8, 1989).

interpretation from EPA's national legal office, this memorandum is entitled to persuasive weight in determining the meaning of the standard. *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979).

In this proceeding, Oklahoma did not reach an interpretation of the antidegardation standard that was inconsistent with EPA's past interpretations of that standard. Its interpretation was clearly consistent with EPA's instructions to the states, its internal legal analysis of the meaning of the standard, and its regulations establishing the *minimum* requirements of preservation and maintenance of outstanding national resource waters. In this particular permit proceeding, it is EPA that has applied an interpretation at odds, not only with the statute's purposes, but with its own past authoritative guidelines, and thus EPA's interpretation should not be accorded weight in this case. *E.g., United States v. Larionoff*, 431 U.S. 864, 872 (1977) (no deference to administrative interpretation if it is "plainly erroneous or inconsistent with the regulation.").

D. Oklahoma's Interpretation Is Consistent With The Interpretation Provided By the Arkansas-Oklahoma Arkansas River Compact Commission.

Congress recognized that pollution disputes could arise between the States. The Clean Water Act encourages compacts between the affected states for the prevention and control of pollution. CWA § 103. Pursuant to this authority, Arkansas and Oklahoma entered into the Arkansas-Oklahoma Arkansas River Compact (Compact), which was approved by both states' legislatures in 1970, and to which Congress had previously consented. OKLA. STAT. tit. 82, § 1421 (1981), ARK. STAT. ANN. §§ 15-23-401, *et seq.*, Pub. L. No. 97, 69 Stat. 184 (1955). The purpose of the Compact is the reduction and prevention of pollution in the Arkansas River Basin, which includes the

Illinois River.[30] To resolve disputes between the two states, the Compact creates an Arkansas-Oklahoma Arkansas River Compact Commission ("Commission"). The Commission is authorized to hold hearings and its findings of fact "are admissible into evidence and shall constitute prima facie evidence of such fact in any court or before any agency . . ." OKLA. STAT. tit. 82, § 1421, Art. IX(A)(8) (1981).[31]

While Fayetteville's NPDES permit application was pending, Oklahoma requested that the Commission conduct a hearing to investigate the impact of the proposed split-flow on the Illinois River in Oklahoma. The Commission issued its order after two days of hearing.[32] Therein, the Commission found that the Illinois River in Oklahoma had undergone a process of degradation in water quality on an "escalating scale" in recent years. R. B-37, ¶ 32-50. After examining the possibility that additional phosphorous from Fayetteville would reach Oklahoma, the Commission entered its unanimous finding:

> The potential increase in phosphorus loading to the Illinois River from Fayetteville's proposed discharge could range from 6% to 23% and, further, that the

[30] To achieve this goal, Arkansas and Oklahoma mutually agree to:

. . .

> Utilize the provisions of all federal and state water pollution laws and to recognize such water quality standards as may be now or hereafter established under the Federal Water Pollution Control Act in the resolution of any pollution problems affecting the waters of the Arkansas River Basin.

OKLA. STAT. tit. 82, § 1421, Art. VII(E) (1981).

[31] The Commission is composed of three members from Arkansas, three members from Oklahoma, and, if designated by the President of the United States or an authorized federal agency, one member representing the United States. The directors of the agencies that administer each state's water laws serve as Commissioners.

[32] At the commencement of the hearing, the Attorney General of Arkansas stated that since the Compact had the force of federal law, its decisions were controlling on both Arkansas and Oklahoma. R., Ark.-6, Transcript, Vol. 1, p. 24.

> potential for or threat of an increased phosphorus loading to the Illinois River from the proposed discharge to the Illinois River in Oklahoma clearly exists. That *should such an impact occur, even if slight in magnitude, further degradation to the Illinois River in Oklahoma will also occur, and such increased degradation will constitute a violation of Oklahoma Water Quality Standards as well as an event of pollution as defined by the Compact.*

Id. at ¶ 73 (emphasis added). The Commission clearly recognized that, given the existing degradation of the River, any additional phosphorous loading from Fayetteville would constitute a violation of Oklahoma's EPA-approved standards.

III. THE TENTH CIRCUIT ACTUALLY NARROWED ITS APPLICATION OF THE OKLAHOMA STANDARDS IN ITS HOLDING AS COMPARED TO THE BROAD MEANING FOUND IN EPA'S REGULATIONS.

The Tenth Circuit did not, as suggested by Arkansas and EPA, engage in an expansive interpretation of the Oklahoma standards that defied EPA policies. Rather, it is EPA's interpretation in the permit proceeding that would not only frustrate the objectives of the Clean Water Act, but which contradicted its own past interpretations and applications of the Oklahoma standards. Further, the Tenth Circuit did not adopt an interpretation of the Oklahoma standards as broad as allowed pursuant to EPA's own regulations. EPA's 1985 Questions and Answers on Antidegradation Policy Statement prohibits any new or point source discharge of waste, on the *presumption* that lower water quality results from such a discharge. And EPA's internal legal memorandum confirms that EPA has interpreted the antidegradation standard to preclude any additional pollutants (presumably even a molecule) from a new or increased point source discharge to reach an outstanding national re-

source water. EPA's "no discharge" prohibition would apply to all the situations covered in the Tenth Circuit's standard, and would also prohibit discharges not reached by the court's standard, such as discharges that would not result in any measurable or observable degradation of a pristine stream, and discharges of pollutants of a type that have not contributed to the degradation of a degraded stream. EPA's broad interpretation fully reflects the basic statutory presumption that the discharge of all pollutants is inherently harmful. CWA § 301.

The Tenth Circuit's application of Oklahoma's antidegradation standard to this particular permit proceeding has a much more precise focus, and is well within the bounds of EPA's authoritative guidelines and internal legal analysis. The Court's legal standard is limited to a situation where a river is protected by federally-approved standards like Oklahoma's antidegradation policy for outstanding national resource waters and beneficial use limitation, and where the river is already in a degraded state before the new permit is authorized.[33] In such a situation, a new effluent discharge that contains the same pollutants that caused the river's current degradation cannot be permitted, whether or not the new discharge individually creates a detectable adverse impact. P.A. 54a, 79a-89a. There is no conflict between the court's standard and EPA regulations and internal analysis. Rather, the court's standard is a narrow applica-

[33] By requiring that the river already be in a degraded state, or that the new discharge degrade it, P.A. 48a, the Court implies that a *de minimis* exception would be available in a case where a discharge leaves a pristine river in its pristine state. Such a *de minimis* exception, however, would not be available under EPA's guidelines and internal analysis. Moreover, while EPA urges before this Court that a *de minimis* exception should be crafted, the EPA Chief Judicial Officer held such an exception not available under the Clean Water Act. In any event, even if a *de minimis* exception were available, it could not permit new point source discharges of pollutants to reach a previously degraded scenic river, the circumstances present here.

tion of those policies to avoid a result clearly inconsistent with the Clean Water Act.

IV. THE TENTH CIRCUIT CORRECTLY RULED THAT THE PERMIT WAS UNLAWFUL.

A reviewing court should not "rubber-stamp . . . administrative decisions that [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983), citing *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) Here, EPA "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), the existing degradation of the Illinois River in Oklahoma. Due to this fundamental error, EPA issued a permit to Fayetteville, notwithstanding that its discharge would add to the Illinois River the same types of pollutants that had contributed to its existing degradation. EPA's interpretation of the Oklahoma standards—requiring a measurable adverse harm from the addition of an inherently harmful pollutant—would permit backsliding, frustrating and undermining a statute *where every requirement looks towards cleaner water, never backward towards relinquishing pollution control gains.*

To determine the proper legal standard, the court of appeals examined the language of Oklahoma's federally-approved standards, EPA's past interpretation of those standards as applied to the same river, as well as EPA's regulations setting the minimum requirements for state antidegradation policies. Moreover, Oklahoma's interpretation was consistent with EPA's instructions to the states that the antidegradation policy for an ONRW prohibited additional point source discharges that reach the river, as well as with EPA's internal legal analyses. But, the Tenth Circuit narrowed its application, even of the most protective of standards, to a situation where an already degraded scenic river would be reached by addi-

tional discharges containing the same pollutants that had contributed to its degradation.

It is well within the scope of a reviewing court's authority to apply a correct legal standard to the facts. *E.g., FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 454 (1986). In this case, the evidence was unrefuted that the Illinois River was degraded even before the Fayetteville discharge was permitted. P.A. 64a-65a. The court of appeals had before it EPA's finding, unchallenged before this Court, that of the eighteen thousand pounds a year of phosphorous that Fayetteville was authorized to place in a tributary to the Illinois River, twenty to twenty-five percent would be available for algae growth in Oklahoma. P.A. 65a. In such a situation, the permit failed to "insure compliance" with Oklahoma's water quality standards and the court of appeals correctly applied the statutory no discharge prohibition of CWA § 301.[34]

CONCLUSION

Petitioners, and Oklahoma at times, have characterized this proceeding as a dispute between states. But much more is at stake: the fulfillment of the Clean Water Act's objectives of eliminating the discharge of pollutants and restoring the Nation's waters to their natural state.

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[34] Arkansas' attack on the Tenth Circuit's opinion is based on a misreading of the Clean Water Act. Oklahoma has not sought, nor does the court's decision provide, an "unfettered veto power" over the Fayetteville discharge into the Illinois River. *See* Ark. Br., p. 28. But this is not the same as to suggest that a discharger may not comply with federally-approved water quality standards made enforceable through CWA § 301(b)(1)(C). Despite Arkansas' claim that the prohibition on the Illinois River discharge is inimical to the Clean Water Act, "[t]he fundamental premise of the Clean Water Act is that 'the discharge of any pollutant by any person shall be unlawful' . . ." *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 109 (D.C. Cir. 1987). In this case, the permit did not insure compliance with Oklahoma's water quality standards, and the permit is therefore unlawful under CWA § 301.

This permit proceeding involves the preservation of the Illinois River, an outstanding national resource water, for which EPA has approved standards prohibiting any degradation. That the river happens to cross a state boundary does not weaken the statutory requirement that Fayetteville comply with that standard. "A River is more than an amenity, it is a treasure."[35] In the Clean Water Act, Congress provided a mechanism that requires the preservation and improvement of these treasures. The opinion of the Tenth Circuit should be affirmed.[36]

Respectfully submitted,

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[35] *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1965) *citing New Jersey v. New York*, 283 U.S. 336, 342 (1930).

[36] The Tenth Circuit ruling, of course, does not prohibit Fayetteville from employing land treatment or other alternative means of disposing of its waste that does not degrade the Illinois River in Oklahoma. The EPA recognized that Fayetteville could be required to implement land application if necessary to protect federally-approved Oklahoma Water Quality Standards. R., A-9. *See also Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 587-89 (D.C. Cir. 1980) (Clean Water Act confers on EPA broad powers to insure compliance with applicable water quality standards, including requiring land treatment or other alternative treatment methods); *Rybachek v. EPA*, 904 F.2d 1276, 1298 n.27 (9th Cir. 1990) (upholding "zero discharge" limitations based on recycling technology).

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Questions Presented.

I. Whether the Clean Water Act (the Act), as further embodied in federally-approved water quality standards and EPA's own regulatory provisions and interpretations, prohibits the permitting of new discharges to protected waters on the basis of a "no detectable impact" standard.

II. Whether the Tenth Circuit exercised the proper scope of judicial review over EPA's permit issuance when the issuance was based on a construction of the Clean Water Act and federally-approved water quality standards that is contrary to clear congressional intent.

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No. 90-1262 and 90-1266

In the

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ARKANSAS, ET. AL.,
PETITIONERS,

v.

STATE OF OKLAHOMA, ET. AL.,
RESPONDENTS.

ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER,

v.

STATE OF OKLAHOMA, ET. AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief for the Oklahoma Wildlife Federation.

Introductory Statement.

The Oklahoma Wildlife Federation ("OWF"), a party to the proceeding in the court of appeals and an affiliate of the National Wildlife Federation ("NWF"), is an organization dedicated to the protection of Oklahoma wildlife and the restora-

tion, preservation and protection of the natural resources that support that wildlife, including Oklahoma's rivers, lakes and streams. As an affiliate of the National Wildlife Federation, its interest in the protection of Oklahoma's wildlife and natural resources is consistent with, and a part of, an interest in protecting, restoring and preserving wildlife, and natural resources, nationwide.

As an environmental organization in Oklahoma, OWF naturally has an interest in the protection of Oklahoma's waters, including those "intra" state portions of the Illinois River at issue here. But, OWF recognizes that its goal and Oklahoma's goal in preserving and protecting the waters of Oklahoma is also an integral part of a goal to improve and preserve the quality of intra and interstate waters, nationwide, a goal also set forth expressly by Congress in the Clean Water Act. To serve this goal, the federally-approved water quality standards of Oklahoma, as will be further demonstrated below, were adopted as and are a part of a national scheme to improve the quality of all United States' waters by preventing the addition of pollutants to those waters by *any* source in *any* state.

Summary of Arugment.

This case is readily resolved by a reading of the plain language of the Clean Water Act and the plain language of federally-approved Oklahoma water quality standards.[1] The Clean

[1] The Clean Water Act will be referred to as the "Clean Water Act" or "the Act". The Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977, Pub. Law. No. 95-217, 91 Stat. 1566 (1977) is the "Clean Water Act" or "Act" to which OWF refers. All citations to the Act are to Title 33 of the 1984 United States Code Codification. For the sake of clarity and consistency, references will be to codified sections rather than to the sections as passed by Congress. For the sake of brevity, OWF does not specifically reference each relevant section or definition of the Act, but instead incorporates the references and explanations of those sections and definitions set forth in the State of Oklahoma's brief.

Water Act is expressly premised on a total prohibition of *any* discharge of pollutants to all navigable waters, except under the exclusive and carefully defined permitting sections of the Act's "National Pollution Elimination Discharge System." 33 U.S.C. §§ 1311(a), 1342. *See also, United States* v. *Earth Sciences*, 599 F.2d 368 (10th Cir. 1979); *Natural Resources Defense Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (emphasis added). The federally-approved Oklahoma water quality standards unambiguously prohibit any new discharges and any degradation to protected waters such as the Illinois River. Oklahoma Water Quality Standards §§ 3 and 5 (J.A. at 28 and 46).

Neither the Clean Water Act's exclusive permitting section (which by its title alone focuses on "national pollutant discharge *elimination*"), nor the federally-approved water quality standards provide any basis for the use of an "no detectable impact" standard to create an exception to both the Act's and standards' express prohibitions against the addition of pollutant discharges to the nation's waters. Rather, in enacting the Clean Water Act, specifically through its 1972 (and 1977) amendments, it was Congress' clear intent to *reject* the use of indefinite standards which had focused on measurements of the "tolerable effects" (or "detectable impact") of water pollution, and which, in prior water pollution acts, had proven "ineffective" in solving the nation's water pollution problems. 33 U.S.C. § 1342, *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202 (1976) (emphasis added). In its amendments to the prior acts, Congress instead shifted its focus to the "preventable causes", of pollution (i.e. point sources) and the elimination of additional pollutant discharges from those sources. *Id*. There is no better evidence of this shift in focus by Congress then that which is found in the plain language of the Clean Water Act and Oklahoma's federally-approved water quality standards.

It is both alarming and remarkable that EPA chose to ignore such plain and unambiguous mandates against the addition of pollutants to the protected waters of the Illinois River by issuing Fayetteville a permit to discharge its wastes into those waters. It is even more remarkable and alarming that EPA did so in complete contradiction to its own longstanding interpretations of its model antidegradation provision (on which Oklahoma's standard is based), in which EPA had correctly concluded that the plain meaning of an antidegradation standard as applied to protected, "outstanding natural resource waters" is "*no* degradation", and *no* allowance of new point source discharges (through a permit issuance), to those waters. Memorandum, James A. Rogers, Associate General Counsel, Water and Solid Waste Division to Kenneth M. MacKenthun, Director, Criteria & Standards Division (Aug. 15, 1979). Here, ignoring its own plain meaning interpretation, EPA mistakenly *allowed* new discharges into the protected waters of the Illinois River which it itself had previously determined were unambiguously *prohibited*.

Moreover, in place of the plain language of both the Clean Water Act and the federally-approved Oklahoma standards, EPA proposes a dangerous and imprecise standard through which it seeks to create an exception where none exists, a standard which provides that new discharges to protected waters are permissible so long as they do not have an individual "detectable impact on the current water quality." (EPA Br. at 22.) The unavoidable consequences of adopting this standard are alarming; any potential discharger of pollutants to protected (or other) waters would be *allowed* to discharge so long as as it could show that its individual discharges were not "detectable." This is a policy "absurdity", which could not be further from Congress' unambiguous intent to *eliminate* the discharge of pollutants to the nation's waters. 33 U.S.C. §§ 1251, 1311(a).

Yet, once again remarkably, EPA argues for deference for its interpretation (EPA Br. at 15, 30-33). EPA's construction of the Clean Water Act and Oklahoma's federally-approved water quality standards, a construction which incorrectly permitted new pollutant discharges to a protected water body on the basis of an inappropriate and prohibited standard, could not be more contrary to Congress' clear intent in enacting the Clean Water Act. EPA is entitled to no deference for this construction. Rather, in reversing the EPA's NPDES permit issuance, the Tenth Circuit simply did what it was required to do (and what EPA failed to do, but *should* have done), it gave effect to the "unambiguously expressed intent of Congress." *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

Argument.

I. THE CLEAN WATER ACT, OKLAHOMA'S FEDERALLY-APPROVED WATER QUALITY STANDARDS, AND EPA'S OWN REGULATORY PROVISIONS AND INTERPRETATIONS, PROHIBIT THE PERMITTING OF NEW DISCHARGES TO PROTECTED WATERS ON THE BASIS OF A "NO DETECTABLE IMPACT" STANDARD.

The Clean Water Act, 33 U.S.C. §§ 1251, *et. seq.*, is premised on a prohibition of *any* discharge of pollutants to navigable waters, except as authorized by the exclusive and carefully-defined permitting sections of the Act. 33 U.S.C. §§ 1311(a), 1342. *See also, Earth Sciences*; *Costle* (emphasis added). It is the goal of the Act to "restore and maintain the chemical, physical, and biological integrity of the nation's waters", and to that end, that "the discharge of pollutants into navigable waters be *eliminated* by 1985." 33 U.S.C. § 1251 (emphasis added).

The only means by which a point source discharger can escape the total prohibition of § 1311(a) is to apply for and obtain a permit specifically authorizing the discharges under the Act's "National Pollution Elimination Discharge System" (NPDES). 33 U.S.C. §§ 1311(a), 1342, *Earth Sciences*; *Costle*.[2]

This case involves the issuance of a permit by EPA to the city of Fayetteville, Arkansas for a municipal wastewater treatment plant which proposed to discharge treated wastewater into both the White River in Arkansas, and the Illinois River, an Arkansas-Oklahoma interstate stream.[3] By virtue of the Clean Water Act's plain language, Fayetteville's proposed discharge of pollutants into the navigable waters of the White and Illinois Rivers was presumptively prohibited. 33 U.S.C. § 1311(a). The exclusive means through which Fayetteville could possibly avoid this prohibition was through seeking, which it did, a permit under the Act's NPDES program." 33 U.S.C. §§ 1311, 1342.

In addition (and as EPA itself correctly concluded), the issuance of a permit to Fayetteville for its potential "pollutant discharges" also depended on compliance with the federally-approved water quality standards of Oklahoma for the Illinois

[2] The plain language of the Act's permitting section, the "National *Pollutant Discharge Elimination* System" explicitly reflects the primary purpose of that section to scrutinize proposed discharges through the permit application process, the ultimate goal being "pollutant discharge *elimination*." 33 U.S.C. § 1342, *see also*, *Menzel* v. *County Utilities*, 712 F.2d 91, 95 (4th Cir. 1983) (emphasis added). Further, permits only *may* be granted if the discharge at issue will meet all applicable requirements under the Act; there is no *requirement* to issue a permit. 33 U.S.C. § 1342(a)(1) (emphasis added).

[3] The White River and the Illinois River are "navigable waters" under the Act. The Fayetteville wastewater treatment plant is a "point source" under the Act which sought to discharge pollutants into navigable waters, specifically the White River and the Illinois River.

River, a designated "scenic river" into which Fayetteville, in part, sought to discharge its wastes. Those standards prohibit "*any* new point source discharge of wastes. . ." into "scenic rivers" (such as the Illinois River) and "*no* degradation" of high quality waters, including "scenic rivers". Oklahoma Water Quality Standards §§ 3, 5 (1982) (J.A. at 28, 46) (emphasis added).[4]

Despite the plain language of both the Clean Water Act and the federally-approved standards, EPA issued the permit. It did so based on a standard which provided that the permit issuance was appropriate if Fayetteville's proposed pollutant discharges would not cause an "actual detectable" or "measurable" violation of Oklahoma's federally-approved water quality standards.

The central issue in this case is whether EPA's issuance of the permit was in accordance with the Clean Water Act and the federally-approved standards. For the reasons stated below, it clearly was not.

A. *Congress' Clear Intent In Enacting The 1972 Federal Water Pollution Control Act Amendments, And The 1977 Clean Water Act Amendments, Was To Reject The Use Of Standards Based On Measurements Of The "Tolerable Effects" Or "Detectable Impact" Of Water Pollution.*

"The first principle of (the Clean Water Act) is . . . that it is unlawful to pollute at all. . . The foremost national goal

[4] Again, for the sake of brevity, OWF incorporates into its brief those arguments made by the State of Oklahoma that the plain language and meaning of the Clean Water Act requires a state to comply with *all* Clean Water Act standards, including those state standards incorporated into the Act through federal approval. Once federally-approved, the water quality standards of a particular state as to its navigable waters, intra or interstate, are standards that must be complied with by any other state that contains a "point source" which seeks to discharge pollutants into the "navigable waters" of the particular state. OWF points out that, although the standards at issue here are those of a "downstream" state in relation to a discharger located in an "upstream" state, some of the nation's most significant water bodies (i.e. the Great Lakes) demonstrate situations where the waters of one state affect the waters of another state without being in a "downstream/upstream" location to each other.

enunciated by Congress is the complete elimination of the discharge of pollutants." *Natural Resources Defense Council* v. *EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987). As this Court has stated:

> Congress's intent in enacting (the Act) was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharge to an administrative apparatus established by Congress to achieve its goals. The major purpose of (the Act) was to establish a *comprehensive* long-range policy for the elimination of water pollution.

Milwaukee v. *Illinois*, 451 U.S. 304, 318 (1981), *citing*, *in part*, S. Rep. No. 92-414 at 95, 2 Leg. His. 1511 (emphasis by court in original).[5] The Act's sponsors "successfully insisted on a *zero-discharge-of-pollutants* goal despite strong objection from both within and without." *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156, 179-80 (D.C. Cir. 1982) (emphasis added).

In amending the 1948 and other prior Acts, Congress engaged in a "total restructuring" and "complete rewriting" of existing water pollution legislation. *Milwaukee* at 317-18, *citing* 1 Leg. Hist. 350-351 (remarks of Chairman Blatnik of the House version of the Amendments); *id.*, at 359-360 (remarks of Rep. Jones, S. Rep. No. 92-414, p. 95 (1971), 2 Leg. Hist. 1511; *id.*, at 1271 (remarks of Chairman Randolph of the Senate Committee which drafted the Senate version of the amendments), and *State Water Resources* at 202.

[5] The court's reference is actually to "the Amendments" of 1972. As stated *supra*, 2n, The Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977, Pub. Law No. 95-217, 91 Stat. 1566 (1977) is the "Act" to which OWF refers.

In its "total restructuring" of the Act, through both its 1972 (and 1977) amendments, Congress purposefully decided to alter the earlier Acts' exclusive reliance on water quality standards which had proven ineffective and which had focused on "*the tolerable effects* rather than the *preventable causes of water pollution*. . ." *State Water Resources* at 202 (emphasis added). Rather, the amendments aim at achieving maximum "effluent limitations" on "point sources." Water quality standards are used as "a supplementary basis for effluent limitations . . . so that . . . point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Id.* at 204-5. *See also*, S. Rep. No. 370 at 42, 95th Cong. 1st Sess., *reprinted in* 1977 U.S. Code Cong. & Admin. News (4326).

Particularly through the NPDES program, the focus of the Act, as amended, shifted from one which *had* looked at "tolerable effects" of water *pollution* to one which now looks at the "preventable causes" of the pollution, i.e. the "point source" of "*pollutant discharges*". Rather than relying on measurements of the "tolerable effects" (or "detectable impact") of discharges being made, the amended Act seeks to prevent any new "pollutant discharges" by a "preventable cause" of pollution, namely a "point source." *Id.*, *Also see*, 33 U.S.C. § 1311(a).[6]

Because it had *proven ineffective*, Congress expressed clear intent in its enactment of the 1972 and 1977 amendments to reject a "tolerable effects" ("no detectable impact") standard as a standard for solving the nation's water pollution problems.

[6] As demonstrated *infra*, pp. 11-15, Oklahoma's federally-approved water quality standards, in accordance with the amended Act's shift in focus, also emphasize preventing source activity through the application of antidegradation standards for protected waters, i.e. by expressly prohibiting *any* new point sources discharge into those waters. Moreover, EPA's own prior interpretation of its model antidegradation provision concluded that a focus on arguments over a measurement of "*x* or *y* micrograms" (i.e., the tolerable effects" or "detectable impact" of water pollution) is "irrelevant" and inappropriate when evaluating whether a permit should be issued to allow discharges to protected waters. See *infra*, pp. 12-13.

Yet, it is just such an ineffective "tolerable effects" or "de minimis" standard that EPA resurrected here in its "no detectable impact" approach to the discharges from the Fayetteville Plant. EPA determined that, if the adverse "effects" of Fayetteville's discharges to the Illinois River could not be definitely demonstrated, then they were effects that were "tolerable", and allowable, in a NPDES permit. In creating this indefinite standard, EPA mistakenly relied on a pre-1972 standard that Congress had so unambiguously altered in its Amendments.[7]

[7] In enforcement actions under the Act against dischargers who have violated the terms of their permits, courts have continually reiterated what Congress so clearly intended; namely there is "no de minimis" standard under the Act and no need for a showing of actual injury for a penalty to be enforced. *Sierra Club* v. *Union Oil*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated on other grounds*, 108 S.Ct. 1102 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988). ("The Clean Water Act and the regulations promulgated under it make no provision for 'rare violations'"); *See also, Chevron USA* v. *Yost*, 919 F.2d 27 (5th Cir. 1990) (discharging foreign substance violates the Clean Water Act without a showing of actual injury); *PIRG* v. *Powell Duffryn Terminals*, 720 F.Supp. 1158, 1167 (D.N.J. 1989) (court rejected defendant's contention that no penalty is appropriate absent an adverse impact on the river into which it had discharged pollutants); *PIRG of New Jersey* v. *C.P. Chemicals*, 26 ERC (BNA) 2017, 2021 (D.N.J. 1987) (to reduce penalties due to a limited or *undetectable* impact would result in a situation where "any permittee could ignore (its permit requirements) . . . as long as it discharged into already heavily polluted waters") (emphasis added); *Also see, generally, Student PIRG of New Jersey* v. *Georgia Pacific*, 615 F. Supp. 1419, 1424 (D.N.J. 1985).

Further, EPA itself, in a notably contrary position to that which it has taken here, in arguing for the imposition of penalties on violators of the Act, has directly stated that a "de minimis" standard is unworkable. *EPA Civil Penalty Policy* at 10 (July 8, 1980) ("all pollutants introduced into the environment create some harm or risk, . . . and it will be difficult in many cases to precisely quantify the harm or risk caused by the violation in question.").

Moreover, in light of Congress' "establishment of such a self-consciously comprehensive program" in enacting the Act, Congress, no doubt, would have included a "de minimis" or "no detectable impact" exception had it wanted to. In contrast, Congress did plainly state such an exception in enacting the Clean Air Act which prohibits only "significant deteriorations" of air quality in "clean air areas", with "significant" quantified in terms of maximum allowable increases in pollutant concentrations. 42 U.S.C. §§ 7471-7473. This is not to say that Congress was "silent" here. Section 1311(a) alone, in its prohibition against pollutant discharges, manifests Congress' voice and intent. 33 U.S.C. §1311(a).

B. *Oklahoma's Federally-Approved Water Quality Standards, And EPA's Own Interpretations Of Its Antidegradation Provision, Unambiguously Prohibit The Permitting Of New Discharges To Protected Waters On The Basis Of A "No Detectable Impact" Standard.*

Under § 5 of Oklahoma's federally-approved water quality standards, the Illinois River has been designated as a "scenic river". "Scenic rivers" (also under § 5) are protected by a prohibition of *any* new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3." Oklahoma Water Quality Standards § 5 (1982) (J.A. at 46) (emphasis added). Section 3 sets forth the standards' "Antidegradation" Policy. Oklahoma Water Quality Standards § 3 (J.A. at 28). Although the antidegradation policy expressly provides for "lower water quality as a result of necessary and justifiable economic or social development" in certain instances, it unequivocally provides that "no degradation shall be allowed in high quality waters which constitute an outstanding resource, or in waters of exceptional recreational or ecological significance. These include water bodies . . . designated (as) 'scenic rivers' ". *Id.* (emphasis added). Section 3 clearly makes no exception to Section 5's otherwise absolute prohibition of *any* new point source discharge of wastes, and thus unambiguously prohibits *any* new pollutant discharge of wastes into the Illinois River. Further § 3 expressly prohibits any degradation to the subject "scenic river". The standards could not be any more simple or clear; *no* new point source discharge and *no* degradation is allowed to scenic rivers, which include the interstate Illinois River.

Moreover, as EPA itself points out, the antidegradation policy of the Oklahoma water quality standards is virtually identical to EPA's own model antidegradation standard in effect

at the time (EPA Br. at 22-23).[8] EPA further states that, because of this replication, in considering the Fayetteville permit application, it interpreted Oklahoma's standard as identical to the federal model (EPA Br. at 23). EPA then maintains, though, that "there has been no national rulemaking or determination on how to interpret and apply the terms of the (model antidegradation) standard", and that it has not attempted to prescribe "what constitutes a 'lowering' of water quality" in an ONRW under an antidegradation standard (EPA Br. at 23-24).

But, despite EPA's statements to the contrary in its brief, EPA *has*, on more than one occasion, evaluated its antidegradation standard and its application to ONRWS. In a 1979 Office of the General Counsel legal opinion, EPA evaluated whether, under the Clean Water Act, EPA may designate particular waters as ONRWS where states fail to do so, and further evaluated whether it may promulgate water quality standards to protect state-designated ONRWS. Memorandum from James A. Rogers, Associate General Counsel, Water and Solid Waste Division to Kenneth M. MacKenthun, Director, Criteria and Standards Division (Aug. 15, 1979). In answering question 2, EPA concluded as follows:

> Assuming a State has adopted an ONRW, you ask if EPA has authority to promulgate a water quality standard to protect the ONRW's status. We are not sure why *any* water quality standard would be neces-

[8] EPA's standard is termed a Tier III antidegradation standard and the waters protected by it are known as "outstanding national resource waters" or ONRW. The standard in effect at the time provided in pertinent part, that "*no degradation shall be allowed* in high quality waters which constitute an outstanding National resource, such as waters . . . of exceptional recreational or ecological significance." 40 C.F.R. 35.1550(e)(2) (1981) (later amended to current regulation, 40 C.F.R. 131.12(a)(3)) (EPA Br. at 22-23) (emphasis added).

> for an ONRW, since the standard is *no* degradation; it would seem that arguments over *x* or *y* micrograms per cubic meter would be irrelevant. Whenever a new point source applied for a permit to discharge into an ONRW, we could simply deny the permit (or force the State to deny the permit through our veto power) under § 301(b)(1)(C), which requires compliance with all state laws.

Id. at 4 (emphasis in original). In a footnote to its statement that the standard is *no* degradation, EPA points out that the standard is "unlike the Clean Air Act concept which is no significant deterioration." *Id.*[9]

EPA conveniently omits any mention of this longstanding legal opinion that clearly highlights the inconsistency of EPA's flawed interpretation of Oklahoma's federally-approved standards here. As EPA itself stated, the antidegradation standard for an ONRW (such as the Illinois River) is *no* degradation." Memorandum, James A. Rogers (Aug. 15, 1979) at 4. The very "arguments over *x* or *y* micrograms per cubic meter" that EPA engaged in here in setting forth its "no detectable impact" standard, are "irrelevant." *Id.* Most importantly, EPA's prior

[9] In 1989, *Catherine A. Winer* (listed as an attorney for EPA on the Solicitor General's Brief in the case currently before the Court) reviewed the 1979 legal opinion in light of 1983 Water Quality Standards rulemaking which referred to the antidegradation policy. Ms. Winer's review did *not* alter the 1979 opinion, except to state that the preamble to the 1983 regulations discussed the "no degradation" requirement for ONRWS and "explained that EPA was modifying it slightly to allow minor, short-term impacts which did not interfere with the character of the ONRW," in part because States were being deterred by the strictness of the no degradation policy from designating ONRWS. Memorandum from Catherine A. Winer, Attorney, Water Division, to William Diamond, Director of Criteria and Standards Division (May 8, 1989). EPA explicitly admits in its brief that the 1983 change in its regulation "did *not* affect the restrictions for long-term sources of pollutants". Rather the change was only to allow for temporary degradation associated with construction projects (EPA Br. at 23, citing to 48 Fed. Reg. 51, 402-51, 403 (1983) (emphasis added).

interpretation, in direct contradiction to its interpretation here, expressly states that "*whenever* a point source applied for a permit to discharge into an ONRW (i.e. as Fayetteville did), (we could) *simply deny the permit*." *Id.* (emphasis added).

EPA *again* recognized the plain meaning of "no degradation" as recently as June, 1991 in an EPA newsletter. There, Mr. William Diamond (to whom Ms. Winer had addressed her 1989 memorandum) stated that "Oklahoma currently maintains a strict antidegradation policy. . . Requirements for Tier 3 Waters, ONRW's, are implemented by allowing *no new point source discharge and no increased loading and concentration in existing permits*." Diamond, William R. Director, Standards & Applied Sciences Division, *Newsletter: Water Quality Criteria & Standards At 5* (June 1991) (emphasis added). It is remarkable that EPA (at the very same time it was drafting its brief in this case) could recite the very water quality standards at issue here correctly in its own newsletter, but offer a completely different interpretation for the purposes of this litigation.

It is undisputed that the permit at issue here would result in "pollutant discharges" into the Illinois River in Oklahoma from a new point source.[10] EPA's decision to employ a standard to *allow* these discharges on the basis that they would not have a "detectable" or "measurable" impact on the protected waters of the Illinois River is contrary to the Clean Water Act's explicit goal to *eliminate* the discharge of pollutants into the nation's waters. 33 U.S.C. §§ 1251(a), 1311(a) (emphasis added). EPA's decision further contravenes Congress' unambiguous intent, in enacting the Act, to reject "inefficient" standards premised on measurements of the "tolerable effects" (or "detectable impact") of water pollution, and to adopt clearer,

[10] For example, the ALJ estimated that 6 pounds of phosphorous alone would reach the Oklahoma boarder daily based on Fayetteville's daily maximum allowable discharge of 3.5 million gallons of effluents. Ark. Pet App. 129a.

more efficient standards focused on point source activity and the prevention of additional discharges from those point sources. See, *id.* and *State Water Resources* at 202.

Oklahoma's federally-approved water quality standards embody Congress' intent by explicitly prohibiting *any* new point source discharge into protected waters (ONRWS), such as the Illinois River. Oklahoma Water Quality Standards §§ 3 and 5 (J.A. at 28, 46). EPA's decision to ignore the plain language of both the Act and these standards and allow Fayetteville's discharges on the basis of an "inefficient" and indefinite standard, is both remarkable and alarming. The decision is even more remarkable and alarming in that it completely contradicts EPA's own longstanding interpretation of its antidegradation provision where EPA *had* correctly concluded that, "*whenever* a point source applied to a permit discharge into an ONRW, (we could) *simply deny the permit*." *Id.* (emphasis added).

Moreover, the unavoidable result of replacing the Act's and standards' plain language with EPA's proposed indefinite standard, a standard under which individual new discharges to protected waters would be permissible so long as they would have no "detectable impact on the current water quality", is simply dangerous (EPA Br. at 22). Use of this indefinite standard would result in an allowance of *any* pollutant discharges to protected (or other) waters so long as a potential discharger could show that its individual discharges had no "measurable" impact. As stated by the Tenth Circuit, such a policy is an "absurdity" which completely contravenes the explicit language and purpose of the Act to *eliminate* discharges 33 U.S.C. § 1251(a)(1); (Op. Below, 908 F.2d 595, 632), (emphasis added).[11]

[11] The Tenth Circuit focused its conclusion on the "absurdity" of EPA's use of a "no detectable impact" standard on the fact that the Illinois River was an already polluted body of water. Its ultimate holding was that "where water quality standards violations are already occurring in the receiving waters, no additional point source

II. The Tenth Circuit Exercised Proper Judicial Review Over EPA's Permit Issuance in that EPA's Construction of the Clean Water Act and the Federally-Approved Water Quality Standards Was Contrary to Clear Congressional Intent.

In a review of an agency's construction of a statute it administers, a court is faced with two questions. First, the court must evaluate whether "Congress has directly spoken to the precise question at issue." *Chevron* at 842. If Congress's intent is clear, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." The judiciary is the final authority on issues of statutory construction and *must* reject administrative constructions which are *contrary* to *clear congressional intent*." *Id.* at 843, citing cases (citations omitted, emphasis added). If, however, the statute at issue is "silent or ambiguous with respect to the precise issue", the question for the court is whether the Agency's construction of the statute was "permissible". *Id.*[12]

discharge to those waters may be permitted if it would contribute to the conditions that produce the violations". (Op. Below, 908 F.2d at 634). While this case does not present the issue, use of a "no detectable impact" standard would be equally "absurd" and prohibited, for many of the reasons stated herein, if applied to waters that did not have pre-existing violations of water quality standards.

[12] In reviewing EPA's permit issuance under the Administrative Procedure Act and appropriate case law, the Tenth Circuit conducted a comprehensive review of the Clean Water Act, the Oklahoma federally-approved water quality standards, and Congress' intent in enacting the Act. (See, Op. Below, 908 F.2d 595, throughout, but in particular at 597-599, 602-607, 609-620 and 630-34). The court, though, also reviewed the background and record of EPA's decision to determine whether EPA's interpretation of the Act was "reasonable". While we agree with the Tenth Circuit's conclusion that EPA's permit issuance was "arbitrary and capricious" and "otherwise not in accordance with law", it is OWF's position that it was not necessary for the court to have reached a "reasonable" or "permissible" analysis of EPA's decision. This is so in that the intent of Congress and the plain language of the Act, along with the plain language of the federally-approved standards, are clear on the precise question at issue; namely, they unambiguously prohibit the issuance of a permit to allow discharges into protected waters on the basis of a

As reiterated throughout, the intent of Congress, as expressed in the plain statutory language of the Act and the Act's legislative history, is clear. Congress unambiguously created a statute to "restore and maintain" the nation's waters, and proclaimed a goal that "the discharge of pollutants into navigable waters be eliminated" 33 U.S.C. § 1251(a). To effectuate this goal, it was clearly Congress' intent in amending the nation's prior water pollution acts to shift the focus from the prior acts' standards and provisions which had emphasized "the (tolerable) effects" of water *pollution* to a system that now unequivocally focuses on eliminating new *pollutant discharges* by "preventable causes (i.e. "point sources" such as Fayetteville). See, 33 U.S.C. §§ 1251, 1311, 1342, *State Water Resources* at 202, 204-5. Oklahoma's federally-approved standards and EPA's own longstanding interpretation of its antidegradation regulation clearly support Congress' intent.

As it had to do (and as the Tenth Circuit in reaffirming EPA's decision had to do), EPA correctly interpreted the plain language of the Act to determine that the federally-approved water quality standards of Oklahoma were applicable to Arkansas' proposed discharges. On this issue *alone*, EPA properly gave effect to the "unambiguously expressed intent of Congress." *Chevron* at 843.

Unfortunately, EPA then diverged from its plain meaning interpretation, and erroneously issued a NPDES permit on the basis of a "no detectable impact" standard, in a decision which unequivocally contravenes the plain language of the Clean Water Act, Congress' unambiguously expressed intent in

"no detectable impact" standard. *Chevron* at 842. If, though, this Court were to determine that "ambiguity" does exist in the statutory language of the Act and in Congress' intent, the record, as evaluated by the Tenth Circuit, conclusively supports a determination that the agency's construction was both impermissible and "arbitrary and capricious".

enacting the Act, and the plain language of the federally-approved water quality standards which EPA had just correctly determined it had to apply. In issuing the permit, it contradicted itself and its own longstanding explicit statements that the plain meaning of an antidegradation standard with respect to protected waters, is "*no* degradation" and *no* allowance of new point source discharges. EPA is simply not entitled to deference for a construction which so clearly contravenes clear Congressional intent, an intent which EPA itself had previously acknowledged in its own interpretations of its model antidegradation regulation, but here chose to ignore. *Chevron* at 842-43. Rather, EPA's blatantly inconsistent construction *reduces* any deference to which it might have otherwise been entitled. *INS* v. *Cardoza-Fonesca*, 480 U.S. 421, 446 (1986); *Motor Vehicle Mfrs.* v. *State Farm Mutual*, 463 U.S. 29, 47-48 (1983); *Environmental Defense Fund* v. *Chicago*, 727 F. Supp. 419, 424 (N.D.Ill. 1989) (emphasis added).

As such, the Tenth Circuit court, as the "final authority on issues of statutory construction" did what it was required to do; it rejected EPA's erroneous construction of the Act and the federally-approved standards, a construction which allowed a NPDES permit to be granted on the basis of a dangerous and "absurd" standard, and instead gave effect to the "unambiguously expressed intent of Congress". *Chevron* at 843. This Court, and numerous other courts, as they have been required to do, have summarily rejected such blatantly dangerous and contrary agency constructions.[13] This Court should uphold the Tenth Circuit's decision and do so here.

[13] For those cases in which this court and other courts have rejected such constructions, see *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26 (1990); *Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158 (1989); *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988); *Cardoza-Fonseca*, 480 U.S. 421; *Board of Governors of the Federal Reserve Sys.* v. *Dimension Financial Corp.*, 474 U.S. 361 (1986); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC* v. *Sloan*, 436 U.S. 103, 117-118 (1978); *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968); *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946); *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Webster* v. *Luther*, 163 U.S. 331, 342 (1896); *Fertilizer Institute* v. *EPA*, 1991 W.L. 96474 (D.C. Cir. 1991) (EPA construction of term "release" under CERCLA is impermissible because it contravenes plain meaning of statute); *Natural Resources Defense Council* v. *EPA*, 915 F.2d 1314 (9th Cir. 1990) (EPA not accorded deference for its restrictive construction of 304(1) (33 U.S.C. 1314(1) of the Clean Water Act in its regulations, in that the regulations were not in accordance with clear statutory provisions); *Abramovitz* v. *EPA*, 832 F. 2d 1071 (9th Cir. 1987) (EPA exceeded its authority by deferring action indefinitely, contrary to an explicit deadline in the Clean Water Act); *American Mining Congress* v. *EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (EPA's construction of the term "discarded material" under RCRA contravenes clear interest of Congress); *Natural Resources Defense Council* v. *EPA*, 863 F.2d 1420 (9th Cir. 1988) (struck down EPA's alternative limitation provision that creates possibility of incalculable toxic discharges without regard to degradation of marine environment as an "exception that threatens to swallow the rule" and as arbitrary, capricious, and contrary to the letter and spirit of the Clean Water Act); *Natural Resources Defense Council* v. *EPA*, 790 F.2d 289 (3rd. Cir. 1986) (EPA's definition, in its regulations, of phrase "consistent publically owned treatment works removal" violates Clean Water Act).

Conclusion.

For the foregoing reasons, the judgment of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 29 1991
OFFICE OF THE CLERK

Nos. 90-1266 and 90-1262

In the Supreme Court of the United States

OCTOBER TERM, 1991

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

STATE OF ARKANSAS, ET AL., PETITIONERS

v.

STATE OF OKLAHOMA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY

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Respondents and their supporting amici assert that EPA's interpretation of the federally approved Oklahoma water quality standards is not entitled to judicial deference because it is not reasonable.[1] That

[1] Oklahoma also urges the reasonableness of its own current interpretation of the federally approved standard (Br. 31-39), apparently on the assumption that it is entitled to deference on that basis. As we explain in our opening brief (at

assertion is based largely on two arguments: that EPA's interpretation is inconsistent with its own prior interpretations of the model standards on which the state standard is based, and that the interpretation is inconsistent with the governing statute. Oklahoma Wildlife Federation Br. 11-14; Oklahoma Br. 32-37; NRDC Br. 14-19, 23-24. Neither argument has merit.

1. In arguing that EPA has acted inconsistently with its prior interpretations of the model antidegradation provisions ~~—particularly the Tier III provisions—~~particularly the Tier III provisions applicable to "outstanding national resource waters" (ONRW) —respondents and amici overlook the central issues confronting EPA in determining whether the Fayetteville discharge would comply with the Oklahoma antidegradation policy applicable to the Illinois River at the point where it becomes an ONRW. In the first place, the Fayetteville discharge is not directly into the ONRW; Fayetteville will discharge effluent into a tributary 40 miles upstream from the boundary of the ONRW at the Oklahoma state line. Thus, EPA policy statements interpreting the model antidegradation policy as generally prohibiting new point source discharges directly into waters designated as ONRWs [2] are entirely consistent with its position

16-21), the relevant issue under the Clean Water Act is the reasonableness of EPA's interpretation, not that of the downstream State.

[2] See Memorandum from James Rogers, Associate General Counsel, Water and Solid Waste Division, to Kenneth M. Mackenthun, Director, Criteria and Standards Division (Aug. 15, 1979), cited at Oklahoma Br. 36; Wildlife Br. 12-13; NRDC Br. 23; W. Diamond, Director, Standards & Applied Sciences Division, EPA, *Newsletter: Water Quality Criteria*

concerning the Fayetteville permit. See Region IV, Questions and Answers on Implementation of Tier III of the Federal Antidegradation Policy: Protection of Outstanding National Resource Waters at 2 (Apr. 20, 1989) ("New point source discharges are allowed to waters tributary to ONRW's as long as the discharge will not result in a lowering of water quality as the tributary waterbody enters the ONRW basin."). Treating a discharge into an upstream tributary of an ONRW as the equivalent of a discharge directly into the protected waterbody is simply not supported by the regulatory language or any interpretation authored by the EPA.[3]

The second factor ignored by the respondents and amici is the interstate nature of this controversy. Oklahoma has designated the Illinois River above the 650-foot elevation of Lake Tenkiller as a state scenic river and has protected the water quality in that section of the river with a strict, Tier III antidegrada-

& Standards (June 1991), cited at Wildlife Br. 14; NRDC Br. 24.

[3] Respondents cite (Oklahoma Br. 35) guidance issued by EPA in 1985 stating that new or expanded activities in high quality waters would be subject to the antidegradation provisions because "such activities *would presumably* lower water quality" (emphasis added). EPA, Questions and Answers on Antidegradation at 6 (1985). But this statement does not take the position that all new activities leading to discharges into ONRW waters are to be flatly prohibited; it simply suggests a rebuttable presumption that such activities will lower water quality, and thus run afoul of the antidegradation policy. Where, as here, the record shows that a new activity miles upstream will not lower water quality in an ONRW, and where the same record shows that loadings from existing sources will be substantially decreased, the presumption in question does not in terms apply and would, in any event, be rebutted.

tion requirement. Arkansas has not designated the upstream portion of the Illinois River and its tributaries as an ONRW and has not chosen to apply an equally strict antidegradation requirement to those waters. The imposition of a strict no-new-point-source discharge requirement on an Arkansas discharger as a prophylactic measure to protect the Oklahoma ONRW water quality would override the permissible Arkansas policy choice not to designate its Illinois River waters as an ONRW. Oklahoma may choose to protect its scenic river by barring all new discharges in Oklahoma into tributaries of that river regardless of actual effect on water quality at the boundary of that ONRW. 33 U.S.C. 1370(1). But it is quite another question whether such a policy may be imposed by Oklahoma on Arkansas; certainly EPA did not approve the designation of the Oklahoma portion of the Illinois River as an ONRW with such drastic interstate effects in mind.

This does not mean that EPA or Arkansas was free to ignore the Oklahoma antidegradation policy applicable to the Oklahoma portion of the Illinois River. Instead, the central question posed is how to interpret and apply that policy to the Fayetteville discharge 40 miles upstream of the boundary of the ONRW and in another State. Oklahoma's water quality standards by their terms bar any new discharge of pollutants that will result in "degradation" of water quality in the ONRW.[4] The Oklahoma standards do not define

[4] In suggesting that the plain meaning of the Oklahoma antidegradation standards forbids any new discharge of waste into a scenic river, amici supporting the Oklahoma respondents erroneously assume that a policy of no *degradation* is the same as an absolute requirement barring any *discharges* of pollutants. See, *e.g.*, NRDC Br. 19-20. "Discharge" and "degradation" are two distinct concepts. Indeed, Oklahoma's water quality standards on their face distinguish between a "discharge" and whether the discharge causes a "degradation." Section 5 prohibits discharges into specified waters "except under conditions described in Section 3," and the ONRW provision of Section 3 prohibits degradation, not all discharges. Oklahoma Water Quality Standards §§ 3 and 5 (1982); 90-1266 Pet. App. 96a-97a. Thus, Sections 3 and 5, read together, prohibit only discharges that degrade ONRW water quality.

Similarly, the brief of amicus Senator Nickles, joined by Senator Boren, argues that EPA's model rule formerly must have constituted a complete prohibition on degradation because it had to be altered to allow for temporary degradation resulting from construction. Br. 17-18. We do not dispute that both the Oklahoma standard and the EPA model on which it is based plainly prohibit degradation of ONRWs. The dispute here is instead over what constitutes degradation —*i.e.*, whether it is appropriate, in determining whether there will be a degradation, to consider whether a particular discharge will have an adverse effect on the relevant water quality parameters. There is no support in the Oklahoma standard or EPA's model rule for the Tenth Circuit's outright prohibition on discharges regardless of whether a detectable impact will result.

"degradation," and EPA has not adopted a general definition of the term other than to state that there should not be a "lowering of water quality." See EPA Br. 24 & n.31. In these circumstances, EPA reasonably (hence, permissibly) concluded that there will not be a degradation of water quality in the Oklahoma portion of the Illinois River because there will be no detectable impact on water quality at the Oklahoma boundary from the Fayetteville discharge.[5]

[5] The Oklahoma respondents also challenge the effect on already degraded waters of EPA's interpretation of the Oklahoma standard. The more polluted a river, they argue, the less likely that a new discharge would be prohibited under

2. Respondents correctly assert that one of the goals of the Clean Water Act is eventual elimination of the discharge of all pollutants, and attainment of high water quality standards in the interim. On this basis, they argue that EPA's determination that the Oklahoma antidegradation standard requires a detectable impact (of remote discharges) in the protected waterway is contrary to the policy of the Act. Oklahoma Br. 15, 21-25; Oklahoma Wildlife Federation Br. 3, 5-10. That conclusion, however, scarcely follows from the premise.[6] In any event, the declaration of goals and policy at the outset of the Act

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EPA's approach because the discrete harmful effect of the discharge would become that much less measurable. Oklahoma Br. 22. This assertion oversimplifies the scientific inquiry and does not accurately portray EPA's position. A river may lose its capacity to assimilate pollutants at higher pollution levels, so that more pollution will result in an even greater harmful effect and thus be prohibited under the traditional view of antidegradation espoused by EPA in this case. In any event, the application of antidegradation standards to a particular waterway involves extremely complex technical and scientific analysis. Oklahoma's oversimplified observation illustrates the importance of reserving decisions concerning such applications to the expert regulatory agencies; they should not be addressed *de novo* by the reviewing court. See, *e.g.*, *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

[6] Whether or not the Clean Water Act requires a showing of "harm" for a discharge to be prohibited absent a permit, the EPA reasonably interpreted the Oklahoma standards to prohibit the issuance of permits that would cause degradation, not to ban all remote discharges. As the court recognized in *NRDC* v. *Costle*, 568 F.2d 1369, 1383 (D.C. Cir. 1977), the Clean Water Act embodies "a plain Congressional intent to require permits in any situation of [discharge of] pollut[ants] from point sources"; no showing of harm is required.

states objectives, not precise statutory requirements. "[I]t is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982).

Specifically, the regulatory scheme actually devised by Congress in the Clean Water Act does not require a "zero discharge" policy for pollutants, but instead reflects a "practical recognition of the economic, technological, and political limits on total elimination of all pollution from all sources." *Ibid.* Thus, although Section 301(a) of the Act (33 U.S.C. 1311(a)) announces a general prohibition of the discharge of pollutants into the nation's waters, Section 402(a) allows such discharges pursuant to a permit (33 U.S.C. 1342(a)). The very section that states the goals of the Act directs that they are not to override or otherwise alter the specific provisions contained elsewhere in the Act; instead, the specified objectives are to be read "consistent with the provisions of this [Act]" (33 U.S.C. 1251(a)). Moreover, "[t]he legislative history of the 1977 amendments further suggests caution in indiscriminately relying on the § 101(a) 'goals' to alter the meaning of specific provisions of the Act." *National Wildlife Federation* v. *Gorsuch*, 693 F.2d at 181 (citing S. Rep. No. 370, 95th Cong., 1st Sess. 43-44 (1977), upon which respondents rely).

3. Respondents and their supporting amici also address the issue raised in the Arkansas petition (No. 90-1262) concerning the effect under the Act of the water quality standards of a downstream State on an out-of-state discharge. We did not raise this issue in our petition because the court of appeals decided it in accordance with our position, to which we adhere. Although Arkansas also raises, and respondents and amici address, the related question of the extent of

EPA's authority to modify a downstream state standard in the interstate context, we submit that the Court need not reach that issue in this case, since EPA has never asserted any such authority; it certainly did not so justify its issuance of the Fayetteville permit in this case. See EPA Br. 18-19 n.22. Arguments concerning the scope of the agency's authority to modify downstream state standards should be addressed by EPA in the first instance and in a concrete setting. Until it has done so, judicial consideration of Arkansas's theory would be premature.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed as to the questions presented in petition No. 90-1266.

Respectfully submitted.

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AUGUST 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45044

Supreme Court, U.S.
FILED
SEP 4 1991
OFFICE OF THE CLERK

Nos. 90-1262, 90-1266

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REPLY BRIEF OF PETITIONERS

Respondents and their amici devote most of their briefs to refuting a position the Arkansas petitioners never take. In particular, they characterize Arkansas as contending that downstream state standards can be ignored and "have no bearing" in permit decisions, and they then attack this "Arkansas interpretation" as one-sided and contrary to the goals of the Clean Water Act (CWA). *See, e.g.*, Okla. Br. at 19; Illinois Br. at 12-13; NRDC Br. at 14. This characterization is simply wrong, and as a result, most of respondents' analysis fails to address the issues actually before this Court.

The Arkansas petitioners' opening brief demonstrated that Congress meant in 1972 to establish a balance between the interests of upstream and downstream states. Pursuant to this balance, section 402 of the CWA does require EPA and source state permitting agencies to *consider* the standards and objections of downstream states, and EPA can use its final veto authority to assure that downstream states are treated reasonably. CWA §§ 402(b)(5), 402(d)(2), 402(a)(3). At the same time, these provisions also show that downstream state standards are *not* directly applicable to out-of-state sources, and they expressly grant permitting agencies the discretion *not* to impose additional conditions for achieving the downstream standards. *See* Ark. Br. at 13-17. The plain language of these controlling provisions, and this Court's interpretation of these provisions just four years ago in *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490-91, 497 (1987), therefore foreclose the Tenth Circuit's contrary view, which makes downstream state standards automatically applicable and eliminates all permitting agency discretion.

Whether as a consequence of their "strawman" strategy or of necessity, respondents virtually ignore section 402, this Court's holding in *Ouellette*, and a number of other grounds given by EPA and Arkansas for reversal of the Tenth Circuit's decision. Moreover, the goals that respondents invoke and the other arguments they do pre-

sent in no way justify overturning *Ouellette* and making downstream state standards apply automatically to facilities in upstream states. *See infra* Section I. But even if the Oklahoma standards were somehow applicable, EPA still acted well within its discretion to issue the Fayetteville permit here, and the Tenth Circuit's decision must be reversed. *See infra* Section II.

I. THE CWA GIVES EPA DISCRETION WHETHER TO IMPOSE ADDITIONAL RESTRICTIONS TO PROTECT DOWNSTREAM WATER QUALITY.

A. The Goals Of The Act Do Not Support Respondents' Statutory Construction.

Although respondents and their amici repeatedly invoke the "goals" of the Clean Water Act, neither those goals nor the statute as a whole can support their interpretation of the Act. In fact, despite their efforts to arrogate the mantle of reasonableness, respondents and their amici are the ones advocating an extreme approach for the resolution of interstate disputes, as shown both by the facts of this case and the consequences of their statutory construction.

After considering all the evidence, EPA found that the Fayetteville discharge into tributaries of the Illinois River would have no adverse effect on Oklahoma water quality. Due to the high rate of assimilation in Arkansas (about 75%), EPA concluded that the Fayetteville discharge would increase the river's total phosphorus level by no more than six pounds per day at the Oklahoma border. Ark. P.A. 129a. Moreover, since those six pounds were diluted in an additional 3.5 million gallons of water each day, the Fayetteville discharge as a whole would actually *improve* Oklahoma water quality, by increasing the river's assimilative capacity for nutrients and diluting the pre-existing phosphorus concentrations at the border.[1]

[1] The pre-existing phosphorus concentration at that point was approximately 0.4 mg/l. Memorandum from Martin Maner, R., Vol. IX, Dkt. No. ARK-6 (part 3), Ark. Ex. 10. Since the six pounds of phosphorus from the Fayetteville discharge that reach the

Although phosphorus was the pollutant of greatest concern at the hearings, EPA also found that the Fayetteville discharge would improve dissolved oxygen levels at the Oklahoma border, and even Oklahoma's primary expert witness conceded during the hearings that "there will be no change in terms of algae growth, taste, odor and turbidity." Ark. P.A. at 134a, 139a. *See generally* Ark. P.A. at 127a-144a.

By comparison, Fayetteville's prior treatment plant was not nearly so effective, and as Oklahoma admits, had become a serious detriment to river quality and the environment. In addition, with the growth of the area, Fayetteville concluded that even a new state-of-the-art facility could not solve these problems if it continued discharging all its effluent into the White River. Ark. Br. at 4. Accordingly, the split-flow design Fayetteville ultimately selected, which combined the assimilative capability of the Illinois River tributaries in Arkansas and the White River, was essential for minimizing the facility's overall impact.[2]

EPA's issuance of a permit based on this split-flow design was thus the only rational alternative from an environmental standpoint, and for the reasons shown above, the decision certainly did not protect Arkansas' water quality "at Oklahoma's expense," notwithstanding Oklahoma's rhetorical premise. *See* Okla. Br. at 1, 6-7.

border are diluted by the 3.5 million gallons of water added by the plant's discharge, the maximum phosphorus concentration in the Fayetteville effluent reaching the border would be less than 0.25 mg/l. *See* Ark. P.A. at 128a-129a; J.A. at 67; R., Vol. VII, Dkt. No. C-1 (Vol. II), at 316. In fact, the Fayetteville plant discharges less phosphorus than the permit maximum assumed in these calculations.

[2] Ark. Br. at 4-6. Respondents' suggestion that Fayetteville could readily have chosen a complete "land application" alternative is unfounded. *See* Okla. Br. at 7. In fact, Fayetteville did study this alternative, and the City was unable to implement this approach (beyond its current use) for a variety of reasons, including the City's inability to enter agreements with sufficient neighboring landowners to handle the additional wastewater. *See also* Ark. P.A. at 115a n.11.

This conclusion is even more obvious from a broader regional perspective, since improvements underway at three other Arkansas facilities nearer the border were expected to reduce phosphorus discharges into the Illinois River by about 400 pounds per day, easily offsetting the six pounds added by Fayetteville. *See* Ark. P.A. at 128a, 132a, 153a; EPA Br. at 9 n.10.

The Tenth Circuit's invalidation of the Fayetteville permit, despite these facts, itself demonstrates the extreme nature of the court's holding. The defense of that holding by respondents and their amici similarly reveals the extreme statutory interpretation required to support that holding and its consequences for the rest of the nation. Specifically, they contend that: (i) a discharger must automatically comply with the standards of all downstream states; (ii) downstream states can adopt standards that preclude any new discharges in upstream states; (iii) EPA has no authority to disapprove a state standard that is more stringent than federal minimum requirements; and (iv) EPA and state permitting agencies have no discretion in interpreting or applying downstream standards with respect to upstream sources. *E.g.*, Okla. Br. at 6, 31-32; NRDC Br. at 22. In their view, Oklahoma has the complete and unfettered ability to ban unilaterally all new discharges into most of the waterways of Northwest Arkansas, which eventually flow into Oklahoma. *Id.*

Respondents base this wooden construction almost exclusively on the CWA's goal of eliminating all discharges by 1985. As laudable as that goal may be, Congress recognized from the outset that this goal was aspirational rather than operational.[3] No state, including Oklahoma, can achieve this goal, now or in the immediate future, and neither EPA nor any court other than the Tenth

[3] As Senator Muskie, the Senate sponsor of the provision, explained: "[T]he 1985 deadline for achieving no-discharge of pollutants is a policy objective. It is not locked in concrete. It is not enforceable." 117 Cong. Rec. 38,800 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1262. *See also National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 178-81 (D.C. Cir. 1982).

Circuit has interpreted the goal in the manner proposed by respondents and their environmental interest group supporters.

Not only do respondents misperceive the nature of Congress' goals, but they also ignore the counterproductive and disruptive consequences of their extreme interpretation. As this Court recognized in *Ouellette*, Congress intended to establish a balance between upstream and downstream states, not to grant downstream states control over out-of-state sources. 479 U.S. at 490-91, 497. To maintain this balance, consistent with long-established principles of federalism and state equality, EPA and source state permitting agencies must have discretion regarding the application of downstream standards. As explained by the municipal leagues and other affected parties supporting Arkansas here, upstream sources would otherwise be required to comply with inconsistent and constantly changing standards from as many as ten downstream states.[4] Moreover, by eliminating EPA's role as a meaningful arbiter, respondent's view would interfere with the construction of environmentally improved facilities, as in this case, and even expose upstream sources to selective bans or discrimination.[5]

Consequently, the Tenth Circuit's and respondents' construction of the statute would actually interfere with, not serve, the goals of the statute.

[4] AMSA/Municipal League Br. at 8-12; Nevada Br. at 15-16; Colorado Br. at 13-14; Champion Br. at 6 & n.5; Ark. Br. at 29-30.

[5] *Id.* Although denying any discriminatory intent, Oklahoma has adopted much more lenient standards for downstream segments of the Illinois River where almost all Oklahoma dischargers are located. J.A. at 54. Furthermore, all five river segments designated as scenic rivers by the Oklahoma legislature, and thus subject to the most stringent "(a)" limitations on new discharges, happen to be adjacent to the Arkansas border. *See* 1982 Oklahoma Water Quality Standards (QWQS), App. A. R., Vol. X, Dkt. No. OK-6A, at 17. In each case, these classifications affect almost exclusively Arkansas sources since Oklahoma has adopted more lenient standards for virtually every downstream segment where its own dischargers are located.

B. The CWA Expressly Grants Permitting Agencies The Discretion To Arbitrate Interstate Disputes On A Case-by-Case Basis.

While dwelling on their singular view of the CWA's goals, respondents essentially ignore the statutory provision Congress enacted in 1972 that specifically governs disputes over interstate waterways. *See* Ark. Br. at 3, 13. This provision, which was added as section 402 when Congress created the NPDES program, controls the issuance of permits by both EPA and state permitting agencies, as respondents appear to accept. CWA §§ 402(b)(5), 402(a)(3). By its plain terms, this provision creates a consultative and *discretionary* mechanism that requires permitting agencies to consider, but not necessarily accept, the recommendations of downstream states regarding their standards. Section 402 also authorizes, but plainly stops short of requiring, EPA to veto a permit that fails to require compliance with downstream state standards. CWA § 402(d)(2).[6]

Although respondents themselves appear to concede the discretionary nature of these provisions, *see* Okla. Br. at 18 n.15, their environmental interest group supporters nevertheless suggest reading § 402(d)(2) as *compelling* EPA to veto permits that do not ensure compliance with downstream standards. NRDC Br. at 12-13. The words of the statute will not tolerate this reading. On its very face, this section is permissive and states that the permit

[6] *See* Ark. Br. at 14-15. Section 402(a)(3) makes the provisions of § 402(b)(5) directly applicable to EPA when it acts as the permitting agency, and in that situation, the consultative and discretionary procedures obviously merge. *See* Ark Br. at 15. Some of the relevant factors that EPA may consider in its case-by-case determinations include the relative hardships to the upstream and downstream states, the volume of the discharge, whether the discharge will violate downstream standards, the frequency and duration of any such violation, whether the downstream standards exceed the federal requirements, and whether the downstream state applies similar restrictions to sources in its own state. *Cf.* S. Rep. No. 50, 99th Cong., 1st Sess. 49 (1985), *reprinted in* 2 Leg. Hist. of 1987, at 1420, 1470.

shall be denied "*if* the Administrator . . . objects." CWA § 402(d)(2) (emphasis added). Moreover, it would be absurd to read this "if" as creating a mandatory duty for EPA when § 402(d)(3), the following subsection, expressly authorizes EPA to waive any review of a state permitting agency's decision not to follow a downstream state's recommendations. Not surprisingly, therefore, every other court of appeals interpreting § 402(d)(2) has concluded that EPA's decision to veto a permit is discretionary, not mandatory. *See* Ark. Br. at 14.

For their part, respondents suggest that instead of § 402, interstate disputes should be controlled by language in § 401(a)(2), an older provision that predates the NPDES program. In particular, this provision requires EPA to seek the views of downstream states and, based upon the "evaluation and recommendations" of the EPA Administrator, to condition permits "in such manner as may be necessary to insure compliance with *applicable* water quality requirements." CWA § 401(a)(2) (emphasis added). Respondents' reliance on this provision is misplaced for a number of reasons.

First, nowhere does § 401(a)(2) say that "applicable" requirements means all downstream state standards. Respondents simply assume that it does, thereby begging the question. In fact, the provision means that once EPA makes its case-by-case determination whether to treat a particular downstream standard as "applicable," the permit must ensure compliance with the ones EPA makes "applicable." Second, respondents' presumed meaning of "applicable" in § 401(a)(2) would conflict with the acknowledged meaning of the same word in § 401(a)(1), the preceding subsection. In that provision, "applicable" was deliberately limited to the standards set by the source state. Congress made this clear beyond question when it specifically decided against requiring a certification of compliance with downstream state standards under this provision.[7] Moreover, every court construing this provi-

[7] *See* Ark. Br. at 16-17 & n.16; *see also* Senate Consideration of the Conference Report, Oct. 4, 1972, *reprinted in* 1 Leg. Hist. of

sion has held, contrary to the implication of several amici (Sierra Club Br. at 7; Illinois Br. at 10), that it only requires a certification of compliance with source state standards.[8]

A third problem with respondents' attempted use of § 401(a)(2) is that this provision does not even apply when state agencies act as the permitting authority under section 402(b). *See* Ark. Br. at 16 & n.15. Respondents' construction would thus violate this Court's admonition that it makes no sense to construe the CWA as imposing different requirements depending on the "fortuitous circumstance" of whether EPA or a state acts as the permitting agency. *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-97 (1980). Longstanding principles of statutory construction similarly militate against construing § 401(a)(2) to create this conflict with § 402. *See, e.g., Louisiana Pub. Service Comm'n* v. *FCC*, 476 U.S. 355, 370 (1986); *Adams* v. *Howerton*, 673 F.2d 1036, 1040 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982). Finally, even if § 401(a)(2) could only be read as creating this conflict, the permissive provisions in §§ 402(b)(5) and 402(a)(3) must nevertheless control in NPDES permitting decisions, since Congress enacted the latter provisions more recently and they serve as the specific legal authority for issuing NPDES permits in the first place.[9]

1972, at 161, 176 (exhibit of Sen. Muskie) (state certification is intended "to assure compliance with water quality standards *in that State*") (emphasis added).

[8] *See National Wildlife Fed'n* v. *FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990); *Miners Advocacy Council* v. *State Dep't of Environmental Conservation*, 778 P.2d 1126, 1129 (Alaska 1989), *cert. denied*, 110 S. Ct. 1127 (1990); *Environmental Defense Fund, Inc.* v. *Tennessee Water Quality Control Bd.*, 660 S.W.2d 776, 779 (Tenn. Ct. App. 1983).

[9] Ark Br. at 15-16. *See* 2A C. Sands, *Sutherland on Statutes and Statutory Construction* § 51.02, at 453-54 (4th ed. 1984); *Watt* v. *Alaska*, 451 U.S. 259, 166 (1981) (more recent enactment prevails). In addition, it has long been accepted that a more specific provision

In sum, therefore, section 402 must be regarded as the governing provision, and rather than make downstream standards automatically applicable, this provision directs permitting agencies to determine on a case-by-case basis whether downstream state standards warrant imposing additional conditions in a permit.[10]

C. The Legislative History, EPA's Regulations, And *Ouellette* Further Confirm That Downstream Standards Are Not Automatically Applicable.

The legislative history of the CWA likewise demonstrates that Congress did not intend to make downstream state standards apply automatically to out-of-state facilities, as explained in Arkansas' opening brief. Ark. Br. at 19-24. In response, neither respondents nor their amici are able to cite any contrary evidence in the legislative history that actually addresses the interstate ap-

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preempts an inconsistent provision that is more general. *Brown* v. *General Services Admin.*, 425 U.S. 820, 834-35 (1976); *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 734-35 (1989). *See also MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling'" (quoting *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932))). Moreover, § 402 would also take precedence as the last provision in point of arrangement. *See, e.g.*, 2A C. Sands, *Sutherland on Statutes, supra*, § 46.05, at 92; *Lodge 1858, Am. Fed'n of Gov't Employees* v. *Webb*, 580 F.2d 496, 510 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978).

[10] Respondents and their amici also rely on section 301(b)(1)(C) to support their argument that downstream standards are automatically applicable. *See, e.g.*, Okla. Br. at 17. However, this provision does not address the issue of whether downstream standards apply to out-of-state dischargers, and respondents' reading again simply begs the question. *See* Ark. Br. at 17 n.17. Moreover, there is no suggestion in the legislative history that Congress intended § 301 to require the extra-territorial application of more stringent downstream state standards. In fact, the language and legislative history of § 510 demonstrates that such standards were to apply only to in-state dischargers. *See* Ark. Br. at 25-27.

plication of water quality standards. Under these circumstances, it is inconceivable that Congress could have adopted respondents' extreme interpretation, especially without expressly saying that it was doing so, given the extraordinary impact on state sovereignty and the substantial constitutional implications of allowing one state to regulate facilities in another state.[11]

In the absence of any legislative history sufficient to support their own interpretation, respondents merely cite the general statutory goals and complain that Arkansas' position would cause "interstate water quality to be set at the lowest common denominator." Okla. Br. at 19. What respondents ignore is that Congress chose other measures to address such concerns, and not the measure Oklahoma would prefer here. Specifically, Congress did require EPA to set uniform technology-based effluent limitations, which apply nationally, and granted EPA the authority to review source state standards for consistency with federal minimum requirements. These measures were purposefully crafted to ensure adequate protection of downstream water quality, and even then, Congress still gave permitting agencies the discretion to impose additional conditions in light of downstream standards.[12]

As another substitute for legislative intent, respondents contend that EPA's regulations support their extreme

[11] The extra-territorial application of state standards in this manner would require an "unmistakably clear" authorization from Congress. Ark. Br. at 31; Nevada Br. at 16. A clear congressional statement is required not only by these constitutional implications, but also by the rule that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotations omitted).

[12] *See* citations to the legislative history in *NRDC* v. *Train*, 510 F.2d 692, 709-10 (D.C. Cir. 1975); Ark. Br. at 19-22; AMSA/Municipal League Br. at 8. The consultative mechanism of sections 402(b)(5) and 401(a)(2) were enacted to resolve those few interstate disputes that might arise despite the uniform federal requirements.

interpretation and require automatic application of downstream state standards. *See* 40 C.F.R. §§ 122.4(d), 122.44(d)(4). However, these regulations merely confirm that permitting agencies must require compliance with any "applicable water quality requirements" of downstream states, without determining which of those requirements will, in fact, be applicable in any given case. Like section 401(a)(2), therefore, these regulations are consistent with section 402 and maintain EPA's discretionary authority to decide which downstream standards, based on a case-by-case consideration of all relevant factors, should be applied to a particular discharge.

This is precisely the interpretation offered by EPA when adopting its regulations on water quality standards. At that time, EPA explicitly stated that it would resolve interstate water quality disputes on a case-by-case basis, considering all the relevant factors:

> While it is theoretically possible that two States might have incompatible standards, both of which meet the requirements of the Act and this regulation, such a situation is likely to be rare. If it occurs, EPA will assist the States in resolving the inconsistency. The exact procedures will depend upon the specific circumstances. Therefore, we do not believe it is appropriate to include specific procedures in the Water Quality Standards Regulation to resolve interstate conflicts.

48 Fed. Reg. 51,413 (1983).[13] Respondents offer nothing

[13] Even if EPA's regulations were read to have a broader effect, they could not change the fact that Congress specifically gave EPA the discretion to determine in each case whether and how a facility should be required to satisfy downstream standards. Consequently, even if the regulations were somehow read to mean that EPA will generally find downstream standards "applicable," the agency still retains its full discretion under § 402 to consider and interpret those standards, *see* Ark. Br. at 31-33, as well as to depart from such a presumption of applicability in any individual proceeding. *See, e.g., United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 204-05 (1956).

to suggest that the cited regulations should be construed differently, or given any broader effects in this case.[14]

Accordingly, in light of the plain statutory language and need for a balanced approach, this Court already rejected respondents' and the Tenth Circuit's construction of the Act just four years ago in *Ouellette*. In particular, the Court held that sections 402 *and* 401 give downstream states only an "advisory role" in regulating an out-of-state discharge, whereas the EPA Administrator is delegated "the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters." 479 U.S. at 490-91; *see also* Ark. Br. at 17-18. Respondents' attempt to dismiss this Court's prior construction as "dicta" does not make this Court's interpretation go away, of course. Okla. Br. at 19 n.16. Moreover, respondents' characterization is wrong. In fact, the Court's construction of sections 402 and 401 was essential for its holding that these provisions preempt the application of a downstream state's common law. Under the preemption doctrine, the Court was first required to interpret these CWA provisions allocating

[14] Moreover, any EPA regulation that made downstream standards automatically applicable would constitute an abdication of the role Congress specifically entrusted to EPA as mediator of interstate water quality disputes. Furthermore, since the federally-approved standards remain state law, and their extra-territorial application to other states requires clear Congressional authorization as a matter of constitutional law, *see* Ark. Br. at 27; Nevada Br. at 13-14, such a rule would be highly questionable under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). *See* Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2110-14 (1990) (*Chevron* deference is not appropriate when an *agency* adopts a rule on its own that requires clear *Congressional* authorization); *see also EEOC* v. *Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1237 (1991) (Scalia, J., concurring) (citing Sunstein); *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1780 (1991) (Blackman, J., dissenting) (citing Sunstein); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court has also recognized that less deference should be given to an agency construction that conflicts with an earlier interpretation by this Court. *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989).

into interstate waterways before it could determine whether those provisions conflicted with, and hence preempted, the application of a downstream state's common law. Based on the Court's conclusion that downstream state standards do not apply extra-territorially under the CWA, the Court then concluded that the extra-territorial application of a downstream state's common law also must be preempted, for otherwise the downstream state would be allowed to do indirectly what it cannot do directly. 479 U.S. at 490-91, 495. Given the clear and unequivocal expression of Congressional intent required by this Court to make such a preemption holding,[15] respondents can scarcely support any other construction of the Act in this case.

D. This Court Should Uphold The Fayetteville Permit Based on EPA's Discretion Whether To Apply Downstream Standards.

Since the CWA gave EPA discretion whether to require compliance with the Oklahoma standards at all in this case, EPA necessarily also had broad discretion in interpreting and applying those standards here. Thus, had the Tenth Circuit properly interpreted the CWA's interstate provisions and recognized this broad discretion, it could never have overturned EPA's decision to issue the Fayetteville permit. *See* Ark. Br. at 31-33.

EPA now modestly suggests in its reply brief that this Court can reverse the Tenth Circuit and uphold the Fayetteville permit without needing to address the general applicability of downstream state standards under the CWA.[16] While this conclusion is undoubtedly correct, for the series of reasons addressed in EPA's brief and in

[15] This Court requires that the intent of Congress be "clear and manifest" before finding that a federal statute preempts state law. *California* v. *FERC*, 110 S. Ct. 2024, 2029 (1990); *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 499-500 (1988); *Ouellette*, 479 U.S. at 491; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[16] EPA Reply Br. at 7-8. The Court could not, however, affirm the Tenth Circuit's decision without reaching these broader issues.

Section II of this brief, there certainly is no reason for this Court to stop short of deciding the central question presented here. This Court has already decided that question once in *Ouellette*, as described above, and failing to reaffirm that decision here would create widespread uncertainty and turmoil. The Tenth Circuit, for example, felt free to disregard the *Ouellette* interpretation, and the court of appeals' decision is now being extended in other regions of the country. Accordingly, this Court should reaffirm its *Ouellette* interpretation to provide the simplest and most straightforward basis for decision here, clarify the responsibilities of all states under the CWA, and prevent disruptive interstate disputes from multiplying in the future.

II. EVEN IF DOWNSTREAM STANDARDS WERE AUTOMATICALLY APPLICABLE, THE COURT OF APPEALS SHOULD NOT HAVE OVERTURNED THE PERMIT IN THIS CASE.

As EPA and Arkansas both demonstrated in their opening briefs, even if downstream standards do automatically apply to out-of-state sources, the Tenth Circuit's decision in this case must still be reversed on several independent grounds and the Fayetteville permit upheld.

A. The CWA Delegates To EPA The Discretion To Determine Compliance With Downstream Standards.

Respondents and their amici offer no credible basis for rejecting the two independent sources of discretion under the CWA that authorized EPA to find that the Fayetteville discharge complies with Oklahoma standards. First, even if the Oklahoma standards did apply automatically, EPA must be responsible for defining the term "compliance" as used in the CWA. *See, e.g.*, CWA § 401(a)(2); 40 C.F.R. § 122.4(d). As a matter of federal law, EPA defined that term here to include an element of detectability and concluded that the Fayetteville discharge would comply with the Oklahoma standards so long as it did not have any detectable impact on downstream water quality. *See* Ark. P.A. at 117a n.16; EPA

Br. at 18 n.21; Ark. Br. at 34-36. Respondents object to EPA's definition of compliance by citing cases holding that the CWA does not require a permit violation to be "detectable" or a prohibited discharge to be "harmful." Okla. Br. at 24-25; OWF Br. at 10 n.7. These cases, however, deal with entirely different contexts in which the agency simply used alternative means for objectively determining the Act's requirements. In the instant context, EPA reasonably concluded that an objective test such as detectability was necessary to assess compliance with Oklahoma water quality standards, consistent with well-established judicial precedent.[17] Such objective criteria are especially necessary for demonstrating compliance with water quality standards, because of the complexity and uncertainties in modelling or measuring the effects of particular discharges on water quality many miles downstream.[18]

Second, the CWA also gives EPA, as a matter of federal law, the discretion to interpret state water quality standards in the interstate context. As *Ouellette* unquestionably does hold, a downstream state's standards can apply to out-of-state sources only through federal law. The state standards cannot apply, of their own force, beyond the adopting state's borders. Consequently, when downstream standards are applied in the interstate context, they must be subject to federal interpretation. Moreover, Congress' delegation of responsibility to EPA necessarily carries with it the included authority to interpret the downstream standards that the agency applies in the interstate context.[19] This is particularly

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[17] *See, e.g., Paccar, Inc.* v. *NHTSA*, 573 F.2d 632, 644 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978); *Chrysler Corp.* v. *Dep't of Transp.*, 472 F.2d 659, 675 (6th Cir. 1972). *See also Air Pollution Control Dist. of Jefferson County, Ky.* v. *EPA*, 739 F.2d 1071, 1092 (6th Cir. 1984).

[18] *See EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 204 (1976).

[19] If nothing else, section 401(a)(2) gives a federal permitting agency the authority to interpret downstream standards. While it

true where the state standards are based on federal models published by EPA, as is the case here. *See* EPA Br. at 20 n.25; Ark. Br. at 37. As shown in the opening briefs and demonstrated again below, EPA reasonably exercised this discretion in finding that the Fayetteville discharge would comply with all the Oklahoma standards.

B. Federal Law Does Not Require A Ban On New Discharges.

The Arkansas petitioners' opening brief further demonstrated that there is no basis for the Tenth Circuit's holding that the CWA requires a ban on all new discharges upstream from a pre-existing violation of a water quality standard. *See* Ark. Br. at 42-49. Indeed, respondents and their amici do not even attempt to defend the Tenth Circuit's novel interpretation of the CWA as requiring a generic permit ban upstream from any water quality violation. Rather, they offer an alternative theory that the federal antidegradation policy for outstanding national resource waters (ONRWs) requires an absolute ban on new discharges into such waters or their tributaries. Okla. Br. at 35-36. EPA's regulations impose no such ban on new discharges. On its face, and as its very name indicates, that policy simply prohibits "degradations" and requires only that "water quality shall be maintained and protected." 40 C.F.R. § 131.12(a)(3). Thus, a new discharge that will have no detectable effect on water quality, such as the Fayetteville discharge, is plainly not prohibited by EPA's antidegradation policy.[20]

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is the source state that certifies compliance with its standards under section 401(a)(1), it is the federal permitting agency that has the ultimate decisionmaking power under section 401(a)(1) to consider what requirements to impose to protect the water quality of downstream states.

[20] Respondents are also mistaken in contending that the Fayetteville 201 Facilities Plan Environmental Information Document and the findings of the Arkansas-Oklahoma Arkansas River Compact Commission call into question EPA's finding that the Fayetteville discharge will have no detectable impact on Oklahoma water quality. To the contrary, Dr. Thompson, representing the private consulting organization that drafted the 201 Plan document, testified that the only Oklahoma water quality standard the Fayetteville discharge would possibly violate is a prohibition against all new discharges, *assuming* such a prohibition applies to Arkansas; and, he testified that the Fayetteville discharge would have no measurable effect at the Oklahoma border. R., Vol. VII, Dkt. No. C-1 (Vol. II), at 246-47, 282-83. Similarly, the Compact Commission report only discussed the *potential* increase in phosphoros loading to the Illinois River (R., Vol. X, Dkt. No. OWF-1, at 20), and ended up rejecting Oklahoma's claim that Arkansas was violating the Compact by adversely affecting Oklahoma water quality. *Id.* at 25.

While EPA has never elaborated the requirements of its antidegradation policy in a national rulemaking, several EPA regional offices have produced guidance documents, reviewed by EPA headquarters, which confirm that the federal policy imposes no such ban on new discharges.[21] Moreover, even if the federal antidegradation policy were to require an absolute ban on new discharges directly into an ONRW, it is clear that such a restriction would never apply to *tributaries* of an ONRW.[22] In this case, Fayetteville discharges into a tributary of a tributary of a tributary of the Illinois River, which Oklahoma has designated a scenic river after it crosses the Oklahoma

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[21] *E.g.*, EPA Region V, *Guidance For AntiDegradation Policy Implementation For High Quality Waters*, at 4-5 (Dec. 3, 1986) ("an increased pollutant load" does not constitute "a lowering of water quality . . . if the increase is so small that no significant change in water quality can be demonstrated"); EPA Region 9, *Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12*, at 4 (June 3, 1987) ("If the action will not lower water quality, no further analysis is needed and EPA considers 40 CFR 131.12 to be satisfied"). *See also Commonwealth Edison Co.* v. *Train*, 649 F.2d 481, 485 (7th Cir. 1980).

[22] Although some other EPA regions would appear to ban new discharges *directly* into an ONRW, even those regions do not prohibit new discharges into a tributary of an ONRW. *See, e.g.*, EPA Region IV, *Question and Answers on Implementation of Tier III of the Federal Antidegradation Policy: Protection of Outstanding National Resources Waters*, at 2 (April 20, 1989) ("New point source dischargers are allowed to waters tributary to ONRW's as long as the discharge will not result in a lowering of water quality as the tributary waterbody enters the ONRW basin or cause a change in the essential character or special use which makes the water an ONRW.").

border. Thus, there is no basis whatsoever under federal law for prohibiting the Fayetteville discharge.

C. The Oklahoma Antidegradation Standard Also Does Not Prohibit The Fayetteville Discharge.

Respondents and their amici also offer no valid ground for denying the Fayetteville permit under any reasonable reading of Oklahoma state law. As an initial matter, the Tenth Circuit identified several alleged errors made by EPA's Administrative Law Judge (ALJ) in applying Oklahoma's standards. Ark. P.A. at 45a-46a, 51a-53a. Respondents and their amici do not contest petitioners' demonstration that these alleged errors were either nonexistent or harmless, and thus do not affect the validity of EPA's decision to approve the permit. Ark. Br. at 38-41.[23]

Unable to defend the Tenth Circuit's decision on these grounds, and unwilling to defend the court's "permit ban" holding as a construction of the federal CWA, respondents instead attempt to recharacterize the court's holding as based on Oklahoma's individual antidegradation stand-

[23] Although respondents do offer an attack on the ALJ's eutrophication findings, this attack merely repeats the Tenth Circuit's error of misinterpreting the ALJ's findings. Specifically, the Tenth Circuit accused the ALJ of committing a "glaring error" by allegedly concluding that nutrient uptake by algae reduces the rate of eutrophication. Okla. Br. at 23 n.21; Ark. P.A. at 68a-69a n.47. In fact, the court simply misread the relevant sentence in the ALJ's opinion, and Oklahoma never even mentioned this issue in any of the proceedings below. The ALJ actually stated that at low flows, "the assimilative processes is [sic] at its most effective stage and therefore removes more nutrients upon which algae feed before they reach the Oklahoma border." Ark. P.A. at 129a. Properly read, and as confirmed by the evidence cited in the rest of the ALJ's decision, this sentence simply recognizes that, in low flow situations, nutrient assimilation is enhanced, thereby lowering the amount of nutrients reaching the border and consequently reducing algal growth. In other words, consistent with the testimony at the hearing, it is the natural assimilative processes of the river, and not algal growth, which the ALJ concluded would reduce the rate of eutrophication. *See* R., Vol. VII, Dkt. No. C-1 (Vol. II), at 309.

ard. In particular, respondents contend that the Tenth Circuit gave Oklahoma's standard a dual meaning depending on whether or not the downstream waters are already degraded. *See, e.g.*, Okla. Br. at 30. As shown above, there is no basis for this dual meaning or permit ban in the CWA or federal antidegradation policy. *See infra* pages 16-17. Respondents' opportunistic attempt to engraft this interpretation on its own standard also lacks any foundation. Oklahoma never advanced such an interpretation in the proceedings below, and there is absolutely no suggestion on the face of the standard that it has two meanings depending on whether or not there is existing degradation.

Apart from proposing this novel recharacterization, respondents offer their own theory that the Oklahoma antidegradation standard absolutely prohibits any new discharge, regardless of pre-existing conditions. The standard also cannot support this interpretation, since its language only prohibits "degradation" of an ONRW; it says nothing about banning new discharges that will not degrade water quality. J.A. at 28. Indeed, even the Tenth Circuit would not accept this view and instead interpreted Oklahoma's standard to prohibit only new discharges that result in "any human-caused, *detectable* change" in water quality. Ark. P.A. at 49a (emphasis added).

Moreover, the Beneficial Use Limitations (Section 5) of the 1982 OWQS only designate "scenic river areas" and "such tributaries of those streams as may be appropriate" as being subject to "(a)" protection for ONRW waters. J.A. at 46-47. These limitations therefore do not even apply to unlisted tributaries, and Oklahoma's 1982 standards clearly did not designate the Arkansas tributaries of the Illinois River in question here as being subject to the ONRW protections. 1982 OWQS, App. A, J.A. at 54.[24] Indeed, Oklahoma itself interpreted its 1982 stand-

[24] In 1985, Oklahoma did revise the OWQS to extend ONRW protection to all tributaries of scenic rivers. However, the 1982

ards in this manner as the basis for permitting an increased load for the Tahlequah, Oklahoma wastewater treatment plant.[25]

Finally, even if the Oklahoma standard did prohibit all new discharges, going far beyond the federal minimum requirements, it would constitute a more stringent state standard adopted under section 510 of the CWA and as such, must only apply to in-state dischargers. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 328 (1981); *see also* Ark. Br. at 25-27.[26]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the permit approved by EPA should be reinstated.

OWQS, and not the 1985 OWQS, apply to the Fayetteville permit. Ark. P.A. at 45a n.29. Moreover, when EPA approved the 1985 OWQS which extended ONRW status to tributaries, EPA expressly limited this extension to "streams or portions of streams within the boundaries of Oklahoma." Letter from Myron O. Knudson, Director, Waste Management Div., EPA Region VI, to James Barnett, Executive Director, Oklahoma Water Resources Bd. (Sept. 15, 1986), R., Vol. VIII, No. EPA-6, at 3.

[25] *See* Letter from Lawrence R. Edmison, Director of Oklahoma Dep't of Pollution Control, to Myron O. Knudson, Director, Waste Management Div., EPA Region VI (May 29, 1986). R., Vol. VIII, Dkt. No. EPA-5. Oklahoma subsequently changed its position in light of its opposition to the Fayetteville discharge and the 1985 modifications to the OWQS.

[26] A similar dichotomy exists for interstate pollution abatement under the Clean Air Act. Courts have concluded that an upwind state must protect against interference with the air quality standards of the downwind state that are based on federal requirements, but is not required to comply with downwind state standards that are more stringent than the requirements of federal law. *Connecticut* v. *EPA*, 656 F.2d 902, 909 (2d Cir. 1981); *Air Pollution Control Dist. of Jefferson County, Ky.* v. *EPA*, 739 F.2d 1071 (6th Cir. 1984).

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Dated: September 4, 1991

(10)

No. 90-1262

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

STATE OF ARKANSAS, *et al.*,

Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES, LEGAL FOUNDATION, IDAHO FARM BUREAU FEDERATION, NORTH DAKOTA FARM BUREAU, WYOMING WOOL GROWERS ASSOCIATION, WYOMING PUBLIC LANDS COUNCIL, MONTANA WOOL GROWERS ASSOCIATION, NEW MEXICO FARM AND LIVESTOCK BUREAU, WYOMING STOCK GROWERS ASSOCIATION, IDAHO WOOL GROWERS ASSOCIATION, COLORADO FARM BUREAU, OREGON FARM BUREAU FEDERATION, NORTH DAKOTA WATER USERS ASSOCIATION, INC., WASHINGTON STATE FARM BUREAU, MONTANA FARM BUREAU FEDERATION, SOUTH DAKOTA WATER CONGRESS, WYOMING FARM BUREAU, CALIFORNIA FARM BUREAU FEDERATION, COLORADO CATTLEMEN'S ASSOCIATION, AND NEW MEXICO MINING ASSOCIATION IN SUPPORT OF PETITIONER, STATE OF ARKANSAS

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Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* on behalf of its members, and on behalf of the Idaho Farm Bureau Federation, the North Dakota Farm Bureau, the Wyoming Wool Growers Association, the Wyoming Public Lands Council, the Montana Wool Growers Association, the New Mexico Farm and Livestock Bureau, the Wyoming Stock Growers Association, the Idaho Wool Growers Association, the Colorado Farm Bureau, the Oregon Farm Bureau Federation, the North Dakota Water Users Association, Inc., the Washington State Farm Bureau, the Montana Farm Bureau Federation, the South Dakota Water Congress, the Wyoming Farm Bureau, the California Farm Bureau Federation, the Colorado Cattlemen's Association, and the New Mexico Mining Association.

INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation (MSLF) is a non-profit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state of the country, and who are interested in and affected by the Clean Water Act and the courts' construction thereof. MSLF members include ranchers, miners, cattlemen, and recreationists who not only value but need the stability ensured by western water law.

Participation in the present case allows MSLF to address yet another serious threat to western water law and the rights of sovereign states to control their water resources.

The Idaho Farm Bureau Federation (IFBF) is a free, independent, non-governmental, voluntary organization of farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity, environmental awareness and social advancement, and thereby to promote the national well-being. The IFBF currently has 32,481 member families.

The North Dakota Farm Bureau (NDFB) is a free, independent, non-governmental, voluntary organization of farm and ranch families who have joined their county Farm Bureau organizations and are linked with the North Dakota Farm Bureau and the American Farm Bureau Federation, united for the purpose of analyzing their problems and formulating action to achieve education improvements, economic opportunity and social advancement. The NDFB is county, state and national in scope and its influence is non-partisan, nonsectarian and nonsecret in charter. The NDFB has 26,000 members.

The Wyoming Wool Growers Association (WWGA) has been in existence since 1905. 1,200 people raise sheep in Wyoming; 900 are members of the WWGA. Wyoming is the largest range sheep state in the nation. The WWGA is organized for the purpose of promoting Wyoming's industry products (lamb, wool) and of protecting the

growers (who make up the industry) through organization to advance the interest and promote the general welfare of the sheep industry.

The Wyoming Public Lands Council (WPLC) has 3,500 public land permittees in Wyoming. These are both sheep and cattle ranchers who are organized to promote and to protect public land grazing in order to supply high quality food and fiber to the nation's people.

The Montana Wool Growers Association (MWGA) was organized in 1883 and represents producers of sheep on issues facing the livestock industry. The MWGA is a non-profit association which represents 2,917 producers of sheep in Montana.

New Mexico Farm and Livestock Bureau (NMFLB) is an independent, non-governmental, voluntary organization of farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement, and thereby, to promote the national well being. The NMFLB is local, county, state, national and international in its scope and its influence is non-partisan, non-sectarian and non-secret in character. The NMFLB is the voice of agricultural producers at all levels. The NMFLB has approximately 10,000 family members.

Wyoming Stock Growers Association's (WSGA) object is to advance the interests of the growers of cattle, sheep, horses, or mules within the State of Wyoming and for the protection of the same against frauds and swindlers, and to prevent stealing, taking, and driving away of cattle, horses and other stock from the rightful

owners thereof, and to uphold the Wyoming stock laws. The WSGA represents 1,500 ranchers in Wyoming.

The Idaho Wool Growers Association (IWGA) was organized in 1894 to protect the quality of life for Idaho Wool Growers and to ensure a high quality of life for coming generations of sheep ranching families. The protection of state water jurisdiction is essential to the quality of life for wool growers. The IWGA currently has 1,370 members.

The purpose of the Colorado Farm Bureau (CFB) is to promote, protect, and represent the business, economic, social, and educational interests of the farmers of the State of Colorado, and to develop agriculture. The CFB has over 16,000 member families representing the entire state.

The Oregon Farm Bureau Federation (OFBF) is a general farm organization that represents 11,000 families. The purpose of the OFBF is to work on behalf of agriculture to improve and to protect the ability of those involved in agriculture to produce food and fiber.

The North Dakota Water Users Association (NDWUA) was formed in 1959 as a non-profit corporation. Its members include farmers, ranchers, irrigators, and all types of businesses and entities which are concerned about North Dakota's water resources. The purpose of the NDWUA is to protect, develop, and manage North Dakota's water resources. The NDWUA has 6,700 members.

The Washington State Farm Bureau (WSFB) is a general farm organization of 5,400 family members. As a

voluntary non-governmental organization, the WSFB seeks to improve agriculture for its members by being involved in issues affecting agriculture, its individuals, and the nation. WSFB eagerly works for long-term answers, rather than short-term reactions.

The Montana Farm Bureau Federation (MFBF) is a free, independent, non-governmental, voluntary organization of farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national well-being. The MFBF is local, statewide, national and international in its scope and influence and is non-partisan, non-sectarian, and non-secret in character. The MFBF is a Federation of thirty-two county Farm Bureaus representing 4,000 farm and ranch families.

The South Dakota Water Congress (SDWC) was organized in 1974 to promote responsible management and development of water resources in the State of South Dakota. The SDWC has a membership of approximately 500 associations, corporations, families and individuals.

The Wyoming Farm Bureau Federation (WFBF) is a non-profit organization formed for the express purpose of helping agricultural producers with problems which affect their livelihood. The WFBF represents approximately 2,500 agricultural producers.

The California Farm Bureau Federation (CFBF) is a voluntary membership non-profit corporation. Its primary purpose is to work for the solution of the problems of the farm, the farm home, and the rural community, and to represent, protect, and advance agricultural interests

throughout the State of California. Its members consist of 53 county Farm Bureaus with a combined membership of over 83,000 families. Over 80% of all commercial farmers in California are members of the CFBF.

The Colorado Cattlemen's Association (CCA) is the trade association for Colorado's beef producers and serves as the industry spokesperson to consumers, media, government agencies, and legislators. Founded in 1867, the CCA is the nation's oldest state cattlemen's association. With 47 local county affiliates across the state, the CCA currently services over 2700 dues-paying members.

The New Mexico Mining Association (NMMA) is composed of 22 operating mining companies, 60 associated companies that supply the mining industry with equipment, services, and material, and approximately 400 individual members. The NMMA is an advocate for the mining industry and the responsible development of mineral products in New Mexico, including access to water supplies necessary for the development of mineral commodities.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici adopt the State of Arkansas' Statement of the Case and Statement of Facts.

SUMMARY OF ARGUMENT

This case presents several issues vital to the survival of state sovereignty as it has come to be known over the

past two centuries. The Tenth Circuit, in *State of Okl. v. E.P.A.*, 908 F.2d 595 (10th Cir. 1991), made two erroneous holdings in its interpretation of the Clean Water Act (CWA). First, the Tenth Circuit stated that discharges in upstream source states which may eventually reach the waters of a downstream state are prohibited if the downstream state is in violation of its own water quality standards (WQS). Second, the Tenth Circuit held that the WQS of a downstream state, which may be more stringent than those of an upstream state, must nonetheless be rigidly applied to the upstream state in the context of a discharge from the upstream state which may eventually flow into the waters of the downstream state. This decision must be reversed for several reasons.

First, the decision of the Tenth Circuit is inconsistent with previous holdings of this Honorable Court with regard to these issues. The Supreme Court has stated unconditionally that, under the CWA, courts are precluded from applying the law of an affected downstream state against an upstream source state.

Second, the holding of the Tenth Circuit is at odds with the language of the CWA itself, which specifically provides that affected states may not regulate the WQS of source states. Moreover, the CWA furnishes a remedial program that allows new discharges or increased discharges from existing sources for states which are in violation of their WQS. Combining this provision with the Tenth Circuit holding, a downstream state in violation of its own WQS may permit increased discharges while prohibiting such discharges in an upstream state which is within its WQS.

Finally, the decision of the Tenth Circuit violates two important constitutional principles. First, in allowing a downstream state – and possibly an indian tribe – to dictate the WQS of an upstream source state, the Tenth Circuit is infringing upon the sovereignty granted to the states by the Tenth Amendment to the United States Constitution. Second, the decision infringes upon the power of the Congress to regulate interstate commerce in a situation where uniformity is necessary.

Undoubtedly, the Tenth Circuit overstepped its authority in rendering its decision in the case at bar. This Honorable Court must reverse the decision.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT IS INCONSISTENT WITH PREVIOUS UNITED STATES SUPREME COURT AND CIRCUIT COURT HOLDINGS THAT THE EXTRATERRITORIAL LAW OF A DOWNSTREAM STATE CANNOT BE APPLIED TO AN UPSTREAM STATE.

The Tenth Circuit's holding that a downstream state can impose its water quality standards (WQS) upon an out-of-state facility, and that neither the Environmental Protection Agency (EPA) nor the upstream state has any flexibility in applying or interpreting the WQS of the downstream state, is inconsistent with previous federal court decisions. Only four years ago, this Honorable Court, in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), held that the Clean Water Act preempts a private water pollution suit based upon the common law of nuisance of the state in which the alleged injury occurred,

when the source of the alleged injury is located in another state. The Supreme Court rendered this decision only after a detailed analysis of the relevant portions of the Clean Water Act and the intent of the Congress behind it. As this Honorable Court stated:

> After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the "full purposes and objectives of Congress." [citations] Because we do not believe Congress intended to undermine this carefully drawn statute . . . , we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

479 U.S. at 493-494.

The Seventh Circuit, correctly anticipating this view of the Supreme Court, issued a similar holding in *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), a consolidation of two cases concerning the application of affected state common law to source state discharges. The opinion contains an in-depth discussion of federalism and the need for interstate disputes to be resolved by applying federal law. The Seventh Circuit recognized that the use of an interstate body of water involves the interests of different states and apportionment among users is a matter of special federal concern and the subject of federal law. As the Seventh Circuit stated:

> To argue that all states have an interest in abating water pollution and therefore the interstate application of one state's more stringent standards would benefit all is too simplistic. There

> are legitimate state concerns on both sides of the question . . . . This is a controversy of federal dimensions, implicating the conflicting rights of states and inappropriate for state law resolution. The latter state does not seek mere enforcement of effluent limitations under federal law, but imposition of more stringent limitations.

731 F.2d at 410.

The Seventh Circuit correctly concluded that federal law must govern in situations such as these except to the extent that the 1972 CWA authorizes resort to state law. As this Honorable Court noted in *Ouellette*, "[i]t is unlikely – to say the least – that Congress intended to establish such a chaotic regulatory structure." 479 U.S. at 497.

The Tenth Circuit, in the case at bar, contends that Petitioners' reliance on *Ouellette* and *Milwaukee* is misplaced because the present case involves the applicability of the "federally approved WQS" of an affected downstream state rather than state statutory or common law. *State of Okl. v. E.P.A.*, 908 F.2d 595, 608 (10th Cir. 1990). This insupportable conclusion ultimately will result in the very problem which the Supreme Court attempted to prevent in its *Ouellette* decision – unavoidable chaos through confrontations between sovereign states over a single discharge. The fact that the WQS in question are federally approved is irrelevant. They are still separate state standards adopted by the affected states and only then "approved" by the federal government, if within the permitted standards of the CWA. As a result, the conclusion of the Tenth Circuit that they are federal standards is incorrect. To that degree, the standards of both states are "federal standards." Thus, the Tenth Circuit gives life to

the dilemma which this Honorable Court attempted to exterminate in *Ouellette*.

Ironically, the Tenth Circuit itself previously recognized:

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside of its domain.

Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971). That very entitlement and necessary recognition was the manner in which this Honorable Court dealt with such interstate conflict in *Ouellette*. The decision of the Tenth Circuit is in conflict with *Ouellette* and should, therefore, be reversed.

II. THE TENTH CIRCUIT HOLDING IS DIRECTLY INCONSISTENT WITH THE LANGUAGE OF THE CLEAN WATER ACT.

The text of the CWA does not support the Tenth Circuit's holding that no new discharges or increased loads from existing discharges are to be permitted when a relevant WQS is already being violated. The Tenth Circuit itself stated that there is no "explicit imprimatur" in the CWA for this decision. 908 F.2d at 633. This holding gives affected downstream states an absolute veto power over a permit lawfully issued within a source state under the CWA. This is inconsistent with the plain language of the CWA as enacted by Congress.

A summary of the relevant portions of the CWA is helpful here. Interestingly, the CWA encourages cooperative activities by states such as uniform state laws for the prevention, reduction, and elimination of pollution. 33 U.S.C. §1253(a). However, under the CWA, a state may obtain authority to administer its own permit program for discharges into navigable waters within its jurisdiction. 33 U.S.C. §1342(b). This Honorable Court, in *Ouellette*, construed this provision to mean that "an affected state may *not* establish a separate permit system to regulate an out-of-state source." 479 U.S. at 491. (Emphasis added.)

Of particular importance to the case at bar are the provisions regarding an affected state's rights under the CWA. An affected state does not have the authority to block the issuance of a permit in another state if it is dissatisfied with the proposed standards. Its remedy lies with the EPA Administrator who has the discretion to disapprove the permit if the Administrator finds that the discharge will have an undue impact on interstate waters. 33 U.S.C. 1342(d)(2). As this Honorable Court noted in *Ouellette*:

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States.) Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders.

479 U.S. at 490.

Moreover, the CWA provides for those states which are experiencing WQS violations. Those states are to implement waste load allocation plans designed to bring affected waterways within their state into compliance. 33 U.S.C. §1313(d).

Of further significance to the instant case is what is known as the "savings clause." This portion of the CWA allows states to enforce standards involving discharges of pollutants and preserves the state's jurisdiction over the waters located within the state. 33 U.S.C. §1370. The Supreme Court has construed this language narrowly:

> This language arguably limits the effect of the clause to discharges flowing *directly* into a State's own waters, *i.e.*, discharges from within the State. The savings clause then, does not preclude preemption of the law of an affected State.

Ouellette, 479 U.S. at 493.

One more provision in the CWA deserves mention. The CWA contains a liberal citizen suit provision at 33 U.S.C. §1365, which allows private individuals to commence a civil action against any person, including a state or the United States Government, who is alleged to be in violation of effluent standards under the CWA or in violation of an order issued by the Administrator or a state with respect to such standards. The Tenth Circuit's holding, which allows downstream states to require upstream states to comply with the WQS of downstream states and thereby gives downstream states the power to veto permits if the downstream state is in violation of its own WQS, will result inevitably in a rash of citizen suits under the CWA. It is doubtful that Congress intended this provision to have such an effect.

This language of the CWA and the construction thereof by this Honorable Court is clearly irreconcilable with the Tenth Circuit's holding below. An affected downstream state has no authority to ban a permit issued under the CWA. Such authority would render the entire permitting process meaningless. An affected state's remedy in such a situation lies exclusively with the EPA Administrator.

Additionally, an affected state is not without a cure if it is in violation of its WQS. The CWA, under its waste allocation provision, allows new discharges or increased discharges from existing sources consistent with an approved waste allocation plan. Indisputably, the Tenth Circuit's approach in allowing an absolute ban of new discharges in upstream states by affected downstream states which are in violation of their WQS, without regard to their impact on water quality, is directly inconsistent with the CWA. The Tenth Circuit makes the CWA nonsensical because it gives downstream states the ability to increase discharges while exceeding their own WQS, yet these same downstream states can stop discharges from upstream states which are within the WQS of those upstream states. This decision should, thus, be reversed.

III. THE DECISION OF THE TENTH CIRCUIT VIOLATES THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Tenth Amendment to the United States Constitution states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Accordingly, each state is entitled to its own

autonomy and self-government. As this Honorable Court stated in *Parker v. Brown*, 317 U.S. 341 (1943):

> The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers.

317 U.S. at 359-360.

The decision of the Tenth Circuit to impose the WQS of a downstream affected state on an upstream source state amounts, in effect, to a grant of power to downstream states to enact laws with which upstream states must comply. This decision, if it is allowed to stand, will constitute the beginning of the destruction of the autonomy the states currently enjoy under the Tenth Amendment. With regard to the states' sovereignty, there is nothing more sacred, vital, and essential than a western state's right to control its own water resources.

Ever since gold was panned in California, westerners – through each state's carefully-crafted and developed water law – have been in control of the most important resource of the arid West: water. Congress has repeatedly recognized and deferred to the right of Western states to control their own destiny by having sole jurisdiction over who may obtain and use water rights.

The Tenth Circuit's disregard for the liberty states have possessed since the enactment of the Bill of Rights two hundred years ago this year is troublesome. To preserve state sovereignty, this Honorable Court must reverse the decision of the Tenth Circuit.

IV. THE DECISION OF THE TENTH CIRCUIT, IN LIGHT OF THE PROVISION IN THE CWA WHICH ALLOWS THE EPA TO TREAT INDIAN TRIBES AS STATES, FURTHER INFRINGES UPON STATE SOVEREIGNTY.

The CWA, in 33 U.S.C. §1377, allows the EPA Administrator to treat an indian tribe as a state for purposes of setting WQS and issuing National Pollutant Discharge Elimination System (NPDES) permits. In 1989, the EPA commenced rulemaking with regard to the requirements an indian tribe must meet in order to be considered a state pursuant to this provision.

Applying this provision of the CWA to the Tenth Circuit's decision, an upstream state will have to deal with and address the possibility of more stringent WQS, not only of downstream states, and not only of downstream indian tribes, but also indian tribes within the state itself.

This issue is of more than academic interest to western states. According to 1985 Bureau of Indian Affairs figures and 1974 Department of Commerce figures, some 157 Indian reservations comprising more than 43,878,209 acres are located within the eleven western states.[1] These Indian reservations sit astride or encompass tributaries of the major rivers of the West, including the Colorado River, the San Juan River, the Missouri River, the Yellowstone River, the Columbia River, and the Spokane River.

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[1] These reservations make up a significant portion of many states. Arizona's reservations consist of 20,019,723 acres or 27% of Arizona. California's reservations consist of 568,765

(Continued on following page)

This development poses another significant threat to a state's right to self-government and autonomy. Not only does a state face the possibility of being forced to comply with the WQS of a downstream state and downstream indian tribe, it also encounters the possibility of having its own WQS challenged by an indian tribe within its own borders. Thus, the ruling of the Tenth Circuit threatens the ability of an individual state not only to shield its sovereignty from sources outside its borders, but also from sources within its own borders as well. The Tenth Circuit's decision is detrimental to the autonomy of individual states and must be reversed.

V. THE DECISION OF THE TENTH CIRCUIT IMPOSES AN UNDUE BURDEN ON INTERSTATE COMMERCE.

Article I, Section 8, Clause 3 of the United States Constitution gives Congress the power to regulate commerce among the several states. This Honorable Court defined the term "commerce" in *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, 252 U.S. 436 (1920):

(Continued from previous page)

acres or .6% of California. Colorado's reservations consist of 788,375 acres or 1% of Colorado. Idaho's reservations consist of 791,377 acres or 1% of Idaho. Montana's reservations consist of 5,208,686 acres or 6% of Montana. Nevada's reservations consist of 1,223,779 acres or 2% of Nevada. New Mexico's reservations consist of 7,747,940 acres or 10% of New Mexico. Oregon's reservations consist of 768,665 acres or 1% of Oregon. Utah's reservations consist of 2,319,916 acres or 4% of Utah. Washington's reservations consist of 2,553,722 acres or 6% of Washington. Wyoming's reservations consist of 1,887,261 acres or 3% of Wyoming.

> Commerce, . . . is not traffic alone, it is intercourse, – "It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

252 U.S. at 442.

This broad definition undoubtedly encompasses the transfer of substances among states via interstate waterways. The decision of the Tenth Circuit, in prohibiting discharges in upstream source states which may eventually reach the waters of a downstream state because the downstream state is in violation of its own WQS, imposes an undue burden on interstate commerce. Because the CWA allows the downstream state to continue discharges, this holding gives downstream states significantly more opportunity than the upstream states to use its water resources. This is a clear imposition upon interstate commerce which is detrimental to upstream states.

Likewise, the Tenth Circuit's decision to impose rigidly the WQS of a downstream state on an upstream state burdens interstate commerce. The Tenth Circuit has no authority to grant such liberal power to downstream states to impose limitations on interstate commerce. The power to regulate such commerce belongs to Congress and Congress alone. Congress' direction for the regulation of this type of commerce is found in the CWA.

As the Supreme Court held:

> Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation . . . . Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific

> determination as to whether or not the statute in question is a burden on commerce.
>
> * * *
>
> [E]ven where Congress has not acted, state legislation *or a final court order is invalid which materially affects interstate commerce.*

Morgan v. Commonwealth of Virginia, 328 U.S. 373, 377-378 (1946) (Emphasis added). The Tenth Circuit's decision burdens interstate commerce and must be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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May 1991

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

Nos. 90-1262, 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

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v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

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STATE OF OKLAHOMA, *et al.*,
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On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE STATES OF NEVADA, NEW HAMPSHIRE, NORTH DAKOTA AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE STATES OF NEVADA, NEW HAMPSHIRE, NORTH DAKOTA AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The States of Nevada, New Hampshire, North Dakota and South Dakota respectfully submit thise brief as *amici curiae* in support of petitioners and urge this Court to

reverse the decision by the United States Court of Appeals for the Tenth Circuit in *Oklahoma* v. *EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

INTEREST OF THE AMICI CURIAE

The statute at issue in this case, commonly known as the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, establishes the framework now used for regulating water quality on all of the nation's waterways. The waterways affected by this statutory scheme include thousands of rivers and streams that at one point or another cross a state boundary, as well as countless other rivers and streams that are tributaries of interstate rivers or lakes. The vast majority of the rivers, streams and even creeks running through the Amici States are thus subject to the provisions of the Clean Water Act that govern discharges into interstate waterways.

As enacted by Congress in 1972, Section 303 of the Clean Water Act calls upon each individual state to establish water quality standards for the waters within that state. 33 U.S.C. § 1313. In addition, the Act created a new permitting system, and any "point source" that intends to discharge effluent into a state's waters must obtain a permit under this National Pollutant Discharge Elimination System ("NPDES"). CWA § 402, 33 U.S.C. § 1342. One condition for receiving an NPDES permit is that the discharge from a facility must meet national technology-based effluent limitations set by EPA. CWA § 301, 33 U.S.C. § 1311. Another condition is that the discharge must comply with the water quality standards set by the state in which the source facility is located. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

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[1] This brief is submitted on behalf of the Amici States by their respective Attorneys General. Pursuant to Supreme Court Rule 37.5, the consent of the parties to the filing of this brief is not required.

Pursuant to Sections 303 and 304(a), the water quality standards set by each state must meet federal criteria that EPA publishes and periodically updates, unless a state demonstrates that less stringent standards are warranted by other economic or environmental considerations. 33 U.S.C. §§ 1313, 1314(a). *See also* 40 C.F.R. § 131.10 (g)(6). Accordingly, states must submit their standards for approval by EPA, *i.e.*, for review to assure that they meet the federal minimum requirements, and states must review their standards every three years for this purpose. In recognition that some states might want to adopt stricter standards, however, the general savings clause enacted as Section 510 preserves the right of individual states to establish water quality standards under state law that are *more* stringent than the federal minimum requirements. 33 U.S.C. § 1370.

The Amici States have a vital interest in this case because the Tenth Circuit's decision threatens to render this statutory scheme unworkable and to create unnecessary conflicts among the states. In particular, the Tenth Circuit held that whenever a downstream state has adopted a more stringent or otherwise different standard for any segment of a waterway passing through that state, the Clean Water Act requires sources in upstream states to comply with the downstream state standards, in addition to the standards of their own state. Ark. Pet. App. at 43a. As a result, both public and private facilities will become subject automatically to the most stringent standards and to every varying standard along an interstate waterway, regardless of conditions in the source state.[2] Moreover, the Tenth Circuit held

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[2] In the agency proceeding under review, EPA had issued an NPDES discharge permit for a new, state-of-the-art sewage treatment plant built by the City of Fayetteville, Arkansas. Under the terms of that permit, half of the facility's effluent would flow into a river that crosses into the State of Oklahoma about forty miles downstream from the point of discharge. EPA had approved the

that the agency considering a permit application (here EPA) lacks any authority under the CWA to interpret, temper, or deviate in any way from the water quality standards of the downstream state. *Id.* at 33a. Indeed, the court held that no permit could issue in this case even though it did not disturb EPA's finding that the proposed discharge would have no detectable effect on the downstream state's water quality. *Id.* at 78a.

In addition to compelling a rigid application of downstream state standards, the Tenth Circuit held that any pre-existing violation of a relevant water quality standard—in either the source state or a downstream state—triggers a mandatory ban on new permits for upstream facilities. *Id.* at 44a. This permit ban would apply to any new upstream facility that proposed to discharge effluent of the type associated with a downstream violation, provided that *some* amount of the effluent, even if undetectable, would reach the downstream segment. *Id.* at 79a-80a. Under the Tenth Circuit's view, permitting agencies are bound to enforce this ban immediately, regardless of the conditions causing a violation or other alternatives for remedying the violation.

The Amici States are all deeply committed to the goals of improving water quality. The rigid and unprecedented approach mandated by the Tenth Circuit, however, would eliminate the flexibility that is essential for individual states to achieve those improvements while also serving the other needs of their citizens. Since the vast majority of public and private facilities must discharge into waterways that eventually reach a downstream state, the Tenth Circuit's decision would affect the wastewater treatment plants owned or operated by nearly every major municipality in the nation, as well as the facilities owned by

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permit based on a finding that this discharge would fully comply with the water quality standards of Arkansas and would have no adverse impact on water quality in Oklahoma. Ark. Pet. App. at 151a.

states themselves and other public entities. The Tenth Circuit's approach would also threaten the permitting for all new industrial facilities locating in these states and the permit renewals of existing businesses.

Under the Tenth Circuit's approach, the permitting for all of these facilities would become absolutely dependent on the political choices made by downstream states, regardless of the interests of the upstream state. Downstream states may elect in many instances to adopt stricter standards for some segments of a waterway, perhaps even precluding altogether any new discharges because the adjacent area is sparsely populated or the facilities in that state can discharge into alternative waterways. The Clean Water Act, of course, allows downstream states to make this choice. But segments of that same waterway or its tributaries in an upstream state may pass through more densely populated areas, and the upstream state may accommodate the needs of those areas by setting standards that do allow controlled discharges from appropriate sources.

The Tenth Circuit's construction of the Clean Water Act, however, eliminates the upstream state's ability to make these judgments. Instead, the citizens and facilities of the upstream state are bound rigidly to the decisions made by the downstream state, even though they have no say in making those decisions and the downstream states have no obligation to consider the impact of their decisions on upstream states. This extreme interpretation undermines the responsibility entrusted by the Act to upstream states, eliminates the discretion needed for making permit decisions, and destroys accountability in the standard-setting and permitting processes. Even worse, the Tenth Circuit's one-sided approach removes any incentive for downstream states to negotiate or compromise with upstream states, and it creates instead a system that will encourage economic warfare and retaliaiton among the states.

The Tenth Circuit's imposition of a mandatory permit ban for waterways with pre-existing violations similarly interferes with the responsibility granted to the states and permitting agencies. The Clean Water Act contemplates a progressive approach to the improvement of water quality, which allows individual states to establish priorities and allocate the burden of discharge reductions. The Tenth Circuit's absolute and immediate ban conflicts with the fundamental basis and structure of this regulatory scheme and calls into doubt the availability of permits for countless new public and private projects. Moreover, the court's holding will create intolerable burdens for the states that have implemented EPA-approved programs for issuing NPDES permits to sources within their jurisdiction. CWA § 402(b), 33 U.S.C. § 1342(b). In addition to the responsibility for evaluating compliance with their own state standards, the permitting agencies presumably would be obligated to obtain and consider data regarding the existence of violations on every downstream segment of a waterway, even though such assessments have not been completed on a majority of the nation's waterways.

For all these reasons, the Amici States have a compelling interest in the issues presented by this case and respectfully urge this Court to reverse the decision of the Tenth Circuit.

SUMMARY OF THE ARGUMENT

By compelling permitting agencies to impose on all public and private facilities the water quality standards of each downstream state, and leaving no flexibility for interpreting or applying those standards, the Tenth Circuit's decision upsets the balance struck by Congress in the Clean Water Act among the permitting agencies, the source states, and downstream states. In effect, the decision deprives both EPA and state permitting agencies of the discretion to balance the competing interests of the states, by determining whether a discharge would have an undue impact on downstream waters. It also allows downstream states to do indirectly what they may not do directly—force their own water quality standards on a point source in an upstream state. *See infra* Section I.

As shown below, the statutory structure created by Congress makes each individual state responsible for setting the water quality standards on its own waterways. For subsequent permitting decisions, the statute then requires EPA and state permitting agencies to consider the interests of all states affected by a new source and its discharge. *See infra* Section I.A. But the statute does not make downstream state standards absolutely controlling, because that would eliminate the responsibility of other states and undermine the ability to consider *all* relevant factors in the permitting process. *See infra* Sections I.B., I.C.

The Tenth Circuit's admittedly novel conclusion that pre-existing water quality violations mandate imposing an immediate ban on new discharges is similarly unsupported by the language of the Clean Water Act and its legislative history. *See infra* Section II. No other court has construed the Act in this manner in the almost twenty years since its enactment, and the Tenth Circuit's interpretation would conflict with the procedures Congress specifically created for bringing all waterways into compliance with applicable water quality standards.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT REQUIRE A SOURCE IN ONE STATE TO COMPLY STRICTLY WITH THE STANDARDS OF DOWNSTREAM STATES.

Congress intended when it enacted the Clean Water Act to maintain the sovereignty of each state over its own waters, subject to federal review and coordination. Thus, while the CWA does impose certain minimum federal requirements on states, Section 101(b) of the Act specifically declares that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). By construing the Act in a manner that allows one state to impose its standards on another, the Tenth Circuit's decision undermines this fundamental principle of state sovereignty.

A. The Clean Water Act Preserves The Right Of States To Adopt Stricter Standards That Apply To In-State, But Not Out-Of-State, Sources.

The statutory language, the overall structure of the Clean Water Act, and generally recognized principles of state sovereignty all demonstrate that Congress did not authorize downstream states to impose the water quality standards adopted for their own waters on sources in upstream states. Each state's water quality standards are intimately connected to the local economic, industrial, municipal, agricultural and recreational activities of that state. Recognizing the essentially local character of water quality policies, Congress preserved each state's prerogative to establish the standards that would apply to waterways *within* the state. This preservation of standards adopted pursuant to state law allows the individual states, most familiar with local conditions and problems,

to balance competing uses and determine priorities for their waters.[3]

Congress was concerned, however, that if states had absolute authority to regulate their own waters, some states might enact insufficiently stringent water quality standards in order to attract industry and encourage economic growth. Such "pollution havens" would be especially troublesome if they were located in upstream states, leaving little incentive or opportunity for downstream states to clean up their own waters.[4]

To minimize the problems that might be created by the adoption of inconsistent standards in neighboring states, Congress required the states to obtain federal approval of ambient water quality standards. CWA § 303(c), 33 U.S.C. § 1313(c). In reviewing each new or revised state standard, EPA was directed to ensure that such standards meet the minimum federal requirements of the CWA. *Id.*[5] If EPA disapproves a state standard because it does not meet the federal requirements, and the state subsequently fails to promulgate a revised standard within the prescribed time limits, EPA is required to issue a federal standard. *Id.* This requirement that every state adopt and enforce federally-approved standards was

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[3] In amending an earlier version of the Clean Water Act in 1965 to require states to adopt water quality standards, Congress recognized that states should have primary responsibility for setting water quality standards because of their familiarity with local conditions. *See, e.g.*, 111 Cong. Rec. 8665 (1965) (statement of Rep. Harsha) ("Standards of water quality . . . should be established by the State and local agencies which are most familiar with the matter in a given locality, such as the economic impact of establishing and enforcing stringent standards of water quality.").

[4] *See, e.g.*, 111 Cong. Rec. 8671 (1965) (statement of Rep. Ottinger); 111 Cong. Rec. 8678 (1965) (statement of Rep. Dwyer).

[5] The statute requires EPA to develop and publish water quality criteria to provide guidance to states in promulgating their standards. CWA 304(a), 33 U.S.C. § 1314(a).

intended "to insure uniform water quality standards across the Nation." [6]

Also in deference to the principles of state responsibility and sovereignty, a "savings clause" in the Clean Water Act preserves the right of states to promulgate stricter standards than those necessary to meet federal requirements. CWA § 510(1), 33 U.S.C. § 1370(1). Most interstate disputes over water quality arise when a downstream state exercises this right and chooses to adopt a stricter standard under Section 510.[7] Once the downstream state promulgates a more stringent standard than the states upstream, an inherent tension develops between the water quality policies of the adjoining states. This conflict becomes manifest if the upstream state plans to approve an NPDES permit that complies with its own federally-approved water quality standards, but may not meet the stricter standards of a downstream state.

Because of prior interstate controversies, Congress was aware of the potential for such conflicts between states when it enacted the CWA. Accordingly, in seeking to balance the interests of upstream and downstream states, Congress provided several mechanisms to protect downstream states from unreasonable degradation of their water quality by sources in upstream states. Among these mechanisms, Congress required permitting agencies to consider the views of downstream states regarding

[6] *See* 118 Cong. Rec. 10,795 (Mar. 29, 1972) (statement of Rep. Robison), *reprinted in* 1 Senate Comm. on Public Works, 93d Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendmtnts of 1972, at 727 (1973) [hereinafter Leg. Hist. of 1972]. *See also* 111 Cong. Rec. 8678 (1965) (statement of Rep. Dwyer).

[7] Although most waterways flow through more than one state, few water quality disputes would be expected if adjacent states adopt identical standards based on the federal criteria. In fact, many states do base at least some of their water quality standards on the federal criteria, frequently resulting in uniform state standards. *See* 2 W. Rodgers, *Environmental Law: Air and Water* 247 (1986).

the impact of a new source on their water quality, and Congress anticipated that permitting agencies would place additional restrictions on those sources as warranted in specific cases.[8]

In conjunction with these provisions requiring case-by-case determinations, Congress also gave EPA the power to veto state-issued permits that do not adequately protect the water of downstream states, thereby establishing EPA as the federal mediator of interstate water quality disputes. CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2). Consistent with the statutory goal of preserving state sovereignty, however, the statutory provisions creating these mechanisms did *not* make the downstream standards automatically applicable to the upstream sources, and Congress provided no other authority for one state to impose its water quality standards on sources in another state.

Both this Court and lower federal courts have recognized this Congressional balance and limitation on the applicability of state water quality standards. Specifically, Section 510 has been interpreted as limiting the applicability of the stricter standards one state may adopt to sources within that state's own borders.[9] Accordingly,

[8] CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5); CWA § 402(a)(3); 33 U.S.C. § 1342(a)(3); CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2). Congress also required all dischargers to meet uniform national technology-based effluent limitations, which in most cases will adequately protect downstream water quality. CWA § 301(b), 33 U.S.C. § 1311(b). In addition, federal approval of state water quality standards will ensure that acceptable water quality is achieved in all states. CWA § 303(c), 33 U.S.C. § 1313(c). Finally, Congress authorized the Governor of a downstream state that is adversely affected by a discharge in an upstream state to bring a civil action against the Administrator when the source causing the problem is operating in violation of its permit conditions. CWA § 505(h), 33 U.S.C. § 1365(h).

[9] *See, e.g., City of Milwaukee* v. *Illinois*, 451 U.S. 304, 328 (1981) (under Section 510, "[s]tates may adopt more stringent limitations

Section 510 simply preserves the historic right of a state to adopt and apply stricter standards under its own state law. "Congress thus has chosen not to preempt state regulation when the state has decided to force *its* industry to create new and more effective pollution-control technology." *United States Steel Corp.* v. *Train*, 556 F.2d 822, 830 (7th Cir. 1977) (emphasis added).

The preservation of sovereign state rights in Section 510, therefore, certainly evinces no Congressional intent to give more stringent standards adopted under state law a federal imprimatur that would allow them to be applied extra-territorially against sources in other states. Indeed, such an application of one state's law to override the law in another state would contradict the very purpose of Section 510 to preserve the jurisdiction of each state over its own waters and dischargers.[10] Thus, the section of the Act that specifically allows states to adopt more stringent standards also limits the application of such standards to sources within a state's own borders.

B. The Extra-Territorial Application Of Downstream State Law Is Inconsistent With Congress' Intent, Constitutional Limitations, And Our Federal System.

The Tenth Circuit's holding that a downstream state's stricter standards apply automatically to sources in upstream states would subvert the statutory scheme that Congress enacted. As shown above, Congress intended in

through state administrative processes . . . and apply them to *in-state* dischargers") (emphasis added); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493 (1987) (more stringent state standards adopted under Section 510 can only be applied "to discharges flowing *directly* into a State's own waters, *i.e.*, discharges from within the State") (emphasis in original).

[10] "[N]othing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." CWA § 510, 33 U.S.C. § 1370.

Section 402 of the Act that the permitting agency, whether EPA or the source state, would consider and, if appropriate, impose more stringent standards to protect downstream water quality. But as this Court has stated:

> [A]n affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the *discretion* to disapprove the permit if he concludes that the discharges will have an *undue impact* on interstate waters.

International Paper Co. v. *Ouellette*, 479 U.S. 481, 490-91 (1987) (emphasis added).

This Court's construction in *Ouellette* of the CWA's interstate provisions is further supported by two additional considerations. First, state water quality standards remain *state* law, even after federal approval. The court of appeals apparently overlooked this fact and based its holding, requiring out-of-state sources to strictly comply with the water quality standards of downstream states, on the assumption that EPA approval automatically transformed the state standards into *federal* law. Ark Pet. App. at 13a-14a. However, EPA review merely ensures that state standards meet the federal criteria; the agency has no power to disapprove the more stringent standards allowed by Section 510 for intrastate purposes. *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979).[11] Since EPA approval of a more stringent

[11] In a recent rulemaking, EPA described its policy as follows: "Pursuant to section 510, States have adopted water quality standards more stringent than EPA may consider necessary or appropriate. EPA has taken the position that the Agency is not authorized to disapprove a State water quality standard on the basis that EPA considers the standard to be too stringent." 54 Fed. Reg. 39,099 (1989).

state standard is perfunctory, such approval does not "federalize" the standard.[12]

EPA's General Counsel confirmed this conclusion regarding the actual status of state standards in a 1977 Opinion issued specifically to address the consequences of revisions to those standards. Based upon the structure of the Act, the General Counsel concluded that such standards "remain exclusively State standards" even after federal approval.[13] The General Counsel further explained that:

> EPA's approval only acknowledges the adequacy of the State standards and indicates that promulgation of Federal standards is not required. It does not create a Federal standard which has an existence independent of the State standard.[14]

As part of EPA's reasoning, the Opinion emphasized that unlike a state implementation plan adopted under the Clean Air Act, which does become a federal standard when approved by EPA, a state water quality standard is not approved by notice and comment rulemaking and is not directly enforceable.[15]

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[12] *United States Steel Corp.* v. *Train*, 556 F.2d 822, 837 (7th Cir. 1977) ("the standards are state, not federal regulations").

[13] EPA General Counsel, Memorandum: Revision of Water Quality Standards and Implementation Plans Under § 303 of the Federal Water Pollution Control Act (Feb. 3, 1975), *incorporated in* In Re Bethlehem Steel Corporation, General Counsel Op. No. 58 (Mar. 29, 1977).

[14] *Id.* Similarly, the Conference Report for the 1972 CWA Amendments clearly reflects Congress' understanding that more stringent state standards adopted under Section 510 would constitute state law and not be part of the federal CWA program. S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 331 (1971), *reprinted in* 1 Leg. Hist. of 1972, at 281, 331 ("Section 510 provides that States . . . retain the right to set more restrictive standards and limitations than those *imposed under this Act.*") (emphasis added).

[15] EPA General Counsel, *supra* note 13.

A second consideration reinforcing this Court's interpretation of the CWA in *Ouellette* is the principle that a federal statute should not lightly be construed as giving one state the extraordinary power to control conduct in an adjoining state. The use of state law by one state to regulate industry and municipalities in another state is inimical to our federal system.[16] This Court has therefore long recognized the "cardinal rule" that one state cannot regulate another:

> [No] state can legislate for, or impose its own policy upon the other. . . . One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.[17]

Following this principle, the Supreme Court has consistently invalidated under the Commerce Clause state laws that have the "practical effect" of regulating conduct beyond the boundaries of the state, regardless of the intent of the regulation. *See, e.g., Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945). The extension of one state's law to regulate entities in another state would "offend sister States and exceed the inherent limits of the

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[16] Even the Tenth Circuit recognized this well-established principle: "We do not suggest one state may directly regulate the conduct of a discharger in another state. Such exercise of jurisdiction would exceed traditional bounds of sovereignty." Ark. Pet. App. at 22a n.9. The court nevertheless believed that this principle was not violated in the instant case, based on its mistaken assumption that EPA's rubber-stamp approval of a state water quality standard transformed that standard into federal law. *Id.*

[17] *Kansas* v. *Colorado*, 206 U.S. 46, 95-98 (1907). *See also Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977), quoting *Pennoyer* v. *Neff*, 95 U.S. 714, 722 (1877) (two important principles of interstate relations are "that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . [and] that no state can exercise direct jurisdiction and authority over persons and property without its territory").

State's power." *Shaffer* v. *Heitner*, 433 U.S. at 197. Moreover, the extra-territorial application of state law is objectionable because "[u]nrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 92 (1984).

Congress, of course, may exercise its own power under the Commerce Clause and allow states to adopt regulations that would otherwise exceed the limitations imposed by that Clause. But to do so, and thereby sanction state regulations that would have extra-territorial effect, this Court has held that Congress must express its intent with unmistakable clarity:

> [F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. It is not . . . merely a wooden formalism.

Wunnicke, 467 U.S. at 91-92 (emphasis added). *See also Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982).

Congress certainly did not express such a clear intent in the CWA. No provision in the Act expressly authorizes one state to impose its water quality standards on out-of-state sources. Nor is there any evidence that Congress intended to cause the same result—without expressly saying so—either by allowing one state to set the applicable standards for another's facilities or by requiring permitting agencies to blindly follow a downstream state's standards when approving a permit for an upstream source. To the contrary, the language and structure of the CWA demonstrate that Congress intended to maintain the traditional sovereign roles of each state over its own waters and sources.[18]

[18] *See Ouellette*, 479 U.S. at 487 ("We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located."); *id.* at 494 ("we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source").

The legislative history is thus devoid of any evidence, much less "unmistakably clear" evidence, that Congress affirmatively intended for state standards to apply extra-territorially. In fact, in the statutory provisions where Congress specifically addressed the issue of interstate water quality disputes and the potential for inconsistent state standards, Congress established the notice and hearing procedure of Section 402(b)(5). This provision plainly gives permitting agencies the *discretion* to consider downstream standards and impose more stringent limitations on a case-by-case basis. *See Ouellette*, 479 U.S. at 490-91; Ark. Pet, at 14-16. Similarly, Congress gave EPA the discretion to veto state-issued permits that did not adequately protect downstream water quality, and unambiguously decided *against requiring* EPA to veto every permit that failed to comply with the water quality standards of downstream states. CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2).[19]

Given the statutory and constitutional restrictions on the power of states to regulate beyond their own borders, the CWA cannot be interpreted as requiring sources in upstream states to comply automatically with a down-

[19] The decision by a source state permitting agency to require facilities within its jurisdiction to satisfy a downstream state's standards obviously does not present the same concerns under the Commerce Clause. Nor would a case-by-case determination by EPA, as the permitting or reviewing agency, to impose additional permit conditions in light of a downstream state's standards or concerns. If EPA decided instead, however, to adopt a blanket rule that automatically required sources in upstream states to comply rigidly with the standards of downstream states, EPA's rule would be constitutionally suspect. Only Congress has the power to "sanction" state regulation that would otherwise violate the Commerce Clause. Moreover, such a rule would constitute an abdication of the responsibility Congress assigned EPA to consider downstream state standards on a case-by-case basis.

stream state's standards. The court of appeals' decision is thus fundamentally inconsistent with the structure of our federal system and the regulatory scheme established by Congress in the CWA. A very clear expression of Congressional intent should be required before authorizing one state to impose its state law standards on another sovereign state. Absent such a clear expression, the Act cannot be given the construction adopted by the Tenth Circuit.

C. The Practical Consequences Of The Tenth Circuit's Holding Confirm That Congress Did Not Intend State Standards To Apply Extra-Territorially.

The Tenth Circuit's construction of the CWA, unless overturned, will severely interfere with the NPDES permitting process and will impose extraordinary burdens on states. These consequences further confirm that Congress could not have intended the rule adopted by the court of appeals. Most fundamentally, the decision will disrupt the careful weighing and integration of socio-economic and environmental considerations that Congress intended to underlie th[illegible]blishment of water quality standards.[20] A downstre[illegible]ate that could impose its standards on an out-of-st[illegible]rce would have no incentive, or indeed even the capability, to consider the legitimate socio-economic interests and needs of upstream communities and industries.

While the Amici States in no way mean to suggest that pollution should be tolerated just because it is expensive to eliminate, Cong[illegible]ess did clearly intend for states to consider the burdens imposed on municipalities and businesses as relevant factors in the standard-setting process.[21] A state will normally have the appropriate incen-

[20] *See, e.g.*, 117 Cong. Rec. 38,805 (Nov. 2, 1971) (statement of Sen. Randolph), *reprinted in* 2 Leg. Hist. of 1972, at 1272. *See also* EPA, Water Quality Standards Regulation, 48 Fed. Reg. 51,400 (1983).

[21] *See Ouellette*, 479 U.S. at 494.

tives to accommodate the interests of sources within its own borders, but has no similar incentive to consider, and hence is likely to disregard, the economic impact of its standards on out-of-state municipalities and industries.[22] Thus, the Tenth Circuit's decision, besides being contrary to the CWA, would frequently result in the unfair and unreasonable application of downstream standards to out-of-state sources.[23] The nationwide application of the decision below would therefore dramatically increase water quality conflicts and "economic warfare" between the states.[24]

By allowing two or more states to impose separate discharge standards on a single point source, the Tenth Circuit's construction of the Act will also create immense practical problems. Prior to the decision below, state agencies normally based permit approvals on a facility's compliance with the water quality standards of the source

[22] Furthermore, out-of-state sources required to comply with a downstream state's standards will be deprived of the other safeguards provided by the CWA to ensure that water quality standards do not impose unreasonable burdens. For example, states are authorized to relax water quality standards that "would result in substantial and widespread economic and social impact." 40 C.F.R. § 131.10(g)(6). A downstream state is unlikely to implement such a safeguard to protect the economic viability of out-of-state communities.

[23] EPA will have no authority to prevent such unfair and unreasonable consequences. The agency has no power to disapprove the *adoption* of a state standard on the grounds that it is unreasonably stringent or will unjustly impact sources in other states. *See supra* p. 13. Under the Tenth Circuit's holding, EPA also lacks the discretion to consider the fairness and reasonableness of *applying* a downstream standard in each particular circumstance.

[24] The Tenth Circuit's holding also creates the opportunity for some states to intentionally discriminate against sources in adjacent states by adopting stringent water quality standards at their upstream borders, while establishing lower standards on the same waterways through the remainder of the state.

state only, in accordance with the existing case law.[25] The Tenth Circuit's interpretation, however, would require permitting agencies in source states to identify, interpret and apply the relevant standards of all downstream states potentially affected by a proposed discharge. This requirement would overwhelm the state agencies in upstream states, whose staff would now be obliged constantly to monitor and review the standards of downstream states,[26] and could not possibly have been intended by Congress. Moreover, because the imposition of a downstream state's standards could have such severe consequences for a state's economic growth and prosperity, upstream states would often be compelled to participate every time each downstream state revises or sets new water quality standards, assuming the upstream states would be able to receive timely notice of such standard-setting proceedings.[27]

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[25] *See, e.g., Ouellette*, 479 U.S. at 481 (1987); *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *State* v. *Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986), *cert. granted and remanded*, 479 U.S. 1061 (1987).

[26] Public and private point source dischargers within the Amici States will also be adversely affected by the decision of the court of appeals. Existing facilities have been constructed, and new facilities have been planned, based on compliance with the water quality standards of the source state. Many facilities may now be required to achieve stricter effluent limitations to meet the standards of downstream states. Such changes may involve expensive retrofitting or remodeling of facilities and the disruption of business operations and municipal sewer service.

[27] As this Court previously recognized in *Ouellette*, the CWA's notice provisions regarding interstate waterways further demonstrate that Congress could not have intended a downstream state's standards to apply automatically to sources in an upstream state. 479 U.S. at 495 n.15. The Act generally requires notice and an opportunity to participate for any entity that would potentially be affected by a proposed regulation. Significantly, the Act does not require downstream states to notify upstream states of their new or revised water quality standards, suggesting that Congress did not expect such standards would automatically apply to sources in upstream states. In contrast, an upstream state is required to notify and consider recommendations from downstream states whose water quality may be affected by a proposed permit in the upstream state. CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5); CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2). These notice provisions confirm that Congress intended the permitting agency in the source state, and not a downstream state, to determine the applicable standards for discharges into an interstate waterway.

The potential for confusion and resulting interstate disputes would grow exponentially as each state is required to interpret and apply the standards of other states.[28] The disruptive consequences of the Tenth Circuit's rule would be further compounded by the 1987 CWA amendment that authorizes EPA to treat Indian tribes as states under the Act. CWA § 518, 33 U.S.C. § 1377. This new provision would vastly increase the number of different standards that may apply to a single discharge under the Tenth Circuit's interpretation of the statute. The inevitable consequence would be even more conflicts, and more unreasonable and unfair extra-territorial applications of standards to sources in other jurisdictions.[29]

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[28] For example, each of the numerous states on the Mississippi River could adopt its own standard for a particular persistent pollutant. A permitting agency in a state near the river's origin would thus be required to interpret and apply the standards of as many as eight or nine downstream states. Alternatively, a state near the mouth of the river may have its standards interpreted and applied by as many as eight or nine upstream states. In fact, the situation could be even more complicated, because each state could adopt more than one standard for the different segments of a particular waterway within its borders. On almost any major interstate waterway in the United States, the Tenth Circuit's decision will create a confusing tangle of inconsistent and overlapping standards, each of which may be subject to several conflicting interpretations.

[29] In fact, the legislative history of the 1987 amendments shows that Congress did not intend to authorize either a state or an Indian tribe to apply its standards extra-territorially. The understanding of Congress was that "there is nothing in the existing Act or in the proposed amendments which gives EPA the power to force one

The Tenth Circuit's interpretation of the Act as requiring out-of-state sources to comply with the water quality standards of each and every downstream state will create massive confusion and economic disruption across the country. It is inconceivable that Congress would have intended to enact a statutory scheme having such sweeping repercussions, especially without clearly articulating its intent and making those requirements explicit in the statutory provisions. Rather, Congress sought to maximize the efficiency and predictability of the permit system it enacted, by establishing "clear and identifiable" discharge standards.[30]

D. The Tenth Circuit's Treatment of Downstream State Standards Was Based On A Flawed Construction Of The Clean Water Act.

From the analysis presented above, it is clear that the court of appeals' treatment of downstream state water quality standards in this case was based on a flawed construction of the CWA. Downstream state standards do not apply of their own force in the permit decisions for upstream facilities. Instead, permit agencies must decide as a matter of discretion whether to impose conditions that will satisfy all or part of the concerns raised by the downstream state and reflected in its standards.

In cases where the downstream state standards are stricter than the federal minimum requirements, pursuant to Section 510 of the Act, the preceding discussion demonstrates that Congress generally expected these standards would be controlling only for in-state sources. To be sure, Congress still directed EPA (and state permitting agencies) to consider these standards in granting permits for upstream sources and to determine whether they warranted imposing additional effluent limitations. EPA did that here, and the agency concluded that no additional permit limitations were needed, in light of the downstream standards, to protect Oklahoma's water quality. Absent a clear abuse of the agency's discretion in making this determination, a reviewing court should not upset the agency's permit decision, and the Tenth Circuit gave no basis for finding an abuse of discretion, apart from the court's mistaken conclusion that the downstream standards were directly applicable.

On the other hand, in reviewing an agency's permit decision concerning downstream standards intended to meet federal minimum requirements, courts must recognize that EPA was responsible for establishing the federal requirements. EPA therefore has special expertise for interpreting those standards, on a nationwide basis, and is most familiar with the scope and content of those requirements. Consequently, EPA's interpretation of those standards in the context of a permit decision, and the agency's determination that a particular discharge will not violate these requirements, must be afforded substantial weight by a reviewing court. The Tenth Circuit erred here by expressly declining to afford EPA any deference on these matters, in addition to the errors in statutory construction addressed above.[31]

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state to changes [sic] its approved water quality standards or those valid activities done in accordance with its plan in order to accommodate the water quality needs of another state or states." 133 Cong. Rec. 1000 (Jan. 8, 1987) (memorandum to Rep. Udall), *reprinted in* 1 Senate Comm. on Env't & Public Works, 100th Cong., 2d Sess., Legislative History of the Water Quality Act of 1987, at 551 (1988) [hereinafter Leg. Hist. of 1987]; 133 Cong. Rec. 1282 (Jan. 14, 1987) (memorandum to Rep. Udall), *reprinted in* 1 Leg. Hist. of 1987, at 395.

[30] *Ouellette*, 479 U.S. at 496 n.16 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1499).

[31] The Court need not decide whether the downstream standard at issue in the present case constitutes a Section 303 standard based on the federal requirements or is instead a Section 510 standard that exceeds the federal requirements, because the court of appeals did not identify any basis for concluding that EPA abused its discretion in either event. Moreover, since EPA found that the proposed

II. THE TENTH CIRCUIT'S PERMIT BAN IS INCONSISTENT WITH THE PLAIN LANGUAGE AND EPA'S ADMINISTRATION OF THE CWA.

The Tenth Circuit's second holding, imposing a ban on all new discharges upstream from a pre-existing violation of a relevant water quality standard, is also a radical departure from the statutory objectives and the current implementation of the CWA. Moreover, this newly discovered ban will deprive states of the flexibility they need to bring degraded waterways into compliance with applicable water quality standards, while at the same time minimizing economic disruption and dislocation.

According to the court of appeals, the "principal flaw" in EPA's decision to issue a permit in this case was the agency's failure to recognize that the purposes embodied in the CWA required imposition of a ban on new discharges upstream from an existing violation of a relevant water quality standard. Ark. Pet. App. at 75a. This ban on new permits even applies to new discharges that will have no detectable effect on downstream water quality. *Id.* at 79a-80a. A new discharge would be prohibited where *any* amount of effluent, even though undetectable, might reach the downstream segment that is experiencing a water quality violation. *Id.* at 82a n.58.

Not only is the imposition of this "implied" ban wholly inappropriate for a reviewing court, but the "remedy" for nonattainment situations chosen by the Tenth Circuit fundamentally conflicts with the plain language of the CWA, as well as Congress' intent and EPA's administra-

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discharge in the present case would comply with the federal minimum requirements in the downstream state, this Court also need not reach the issue of whether permit agencies have less discretion in cases involving downstream Section 303 standards (based on the federal minimum requirements) or should otherwise be under greater constraints in exercising their discretion to impose limitations on out-of-state sources that would satisfy the Section 303 standards adopted by downstream states.

tion of the Act. A brief consideration of the regulatory scheme that preceded the 1972 CWA Amendments demonstrates the radical departure caused by the court's holding. Prior to 1972, ambient water quality standards were the primary means for regulating water pollution. *See EPA* v. *California ex rel, State Water Resources Control Board*, 426 U.S. 200, 202-03 (1976). State standards designated acceptable ambient levels of pollution allowed in receiving waters. If standards were exceeded, attempts were made to trace pollution violations to individual dischargers.

Because of the complex relationship between effluent discharges and water quality, and the resultant difficulty in linking individual dischargers to particular violations of water quality,[32] the Senate Committee on Public Works concluded in 1972 that this approach had been "inadequate in every vital respect." [33] Thus, the 1972 Amendments shifted the primary focus for controlling water pollution from the quality of the receiving waters to technology-based effluent limitations that apply directly to individual dischargers. CWA § 301(b), 33 U.S.C. § 1311 (b). Each source is now required to comply with the appropriate limitations, irrespective of the quality of the receiving water.

Water quality standards were retained as a supplemental measure, however in the 1972 Amendments, and additional, more stringent limitations could be imposed on dischargers if the technology-based limitations were insufficient to achieve compliance with applicable water quality standards. CWA § 301(b)(1)(C), 33 U.S.C.

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[32] "In water pollution, the precise amount of effluent a given river can handle without deterioration of water quality depends not only on the amount of effluent emitted, but also on the temperature of the water, the speed at which the water is traveling, the general characteristics of the waterway, the time of the year, and the like." 1 F. Grad. *Treatise on Environmental Law* § 3.03, at 3-101 (1990).

[33] S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1425.

§ 1311(b)(1)(C). Nevertheless, Congress unmistakably signalled its intent that water quality standards were to be a secondary mechanism for controlling water pollution when it specifically directed EPA to "assign secondary priority" to enforcing water quality standards.[34] But by fashioning a ban based on pre-existing water quality violations, the Tenth Circuit has effectively supplanted technology-based effluent limitations and reverted to water quality standards as the primary regulatory mechanism for control of pollution. This was the very approach that Congress rejected as unworkable in 1972, and the court's decision is therefore clearly inconsistent with the statutory framework.

Congress was well aware that many of the nation's waterways were severely polluted when it enacted the 1972 Amendments,[35] and the absence of any reference in the statute to imposing a rigid permit ban indicates that Congress deliberately chose not to adopt that approach. Rather, in light of those conditions, Congress chose an incremental approach for achieving acceptable water quality by reducing pollution through the imposition over time of progressively more stringent effluent limitations on new and existing point discharges.[36] Nowhere

[34] 118 Cong. Rec. 33,696 (Oct. 4, 1972) (summary prepared by Sen. Muskie of Conference Report), *reprinted in* 1 Leg. Hist. of 1972, at 171. *See EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 n.12 (1976) ("[w]ater quality standards are retained as a supplementary basis for effluent limitations").

[35] S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1415, 1425.

[36] As originally enacted, the 1972 Amendments required point sources other than publicly owned treatment works to achieve the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983. Pub. L. No. 92-500, § 2, 86 Stat. 816, 845 (1972). The timetable for achieving the latter standard was subsequently relaxed to March 31, 1989. *See* CWA § 301(b)(2), 33 U.S.C. § 1311(b)(2).

in either the Act or its legislative history is there any suggestion that Congress ever intended to ban new discharges based solely on evidence of pre-existing water quality violations. Thus, not only is there no "explicit imprimatur" for the Tenth Circuit's holding in the CWA, as even the court conceded, Ark. Pet. App. at 81a, but the holding runs counter to the plain language of the statute.

The specific approach Congress enacted in 1972 deals with existing water quality violations pursuant to an entirely different approach than that created by the Tenth Circuit. In particular, states with existing water quality violations are required by Section 303(d) to set maximum daily loads of discharged effluent which will result in the attainment of relevant water quality standards. 33 U.S.C. § 1313(d).[37] Moreover, the Act does not impose on states any fixed timetable for establishing maximum daily loads for all waterways with existing water quality violations. Instead, states may establish maximum daily loads according to the priority they themselves assign their various waterways. In contrast to the Tenth Circuit's approach, new discharges and increased discharges from existing sources would still be allowed, provided they are included in the maximum daily load allocation. 33 U.S.C. § 1313(d). Under this scheme, no one point source is solely penalized for the water quality violations caused by other dischargers.

Furthermore, the Tenth Circuit's ruling would preclude the issuance of permits even where the proposed discharge would have no detectable effect on the downstream water quality of interstate and intrastate waterways. Under the ruling, the mere existence of a water quality violation in and of itself is sufficient to foreclose a new permit, notwithstanding the absence of a measurable effect of the proposed new discharge on the receiving

[37] A maximum daily load is the total quantity of effluent that can be discharged into a waterway per day without exceeding the relevant water quality standards.

waters. Besides having no basis whatsoever in the Act, and being inconsistent with the specific mechanism Congress created for this situation, the novel approach fashioned by the Tenth Circuit would seriously disrupt the administration of the Clean Water Act.

Until now, permitting decisions have generally been based on whether the release of effluent by an individual point source would itself cause violations of water quality standards.[38] Under the Tenth Circuit's new approach, however, permitting agencies will be required to look beyond the impact of the individual source and assess whether every downstream segment of the waterway is in attainment with all applicable water quality standards. This task will be extremely difficult, if not practically impossible, because water quality data is only available for less than one-third of the nation's stream miles.[39] The court's decision will thus necessitate expensive and time-consuming data gathering from all downstream states, information that has not heretofore been collected by permitting agencies or permit applicants.

The Tenth Circuit's ban on new permits, if applied nationwide, will also have significant ramifications for public facilities and economic development in many states. As a result of the numerous existing violations of relevant water quality standards throughout the nation,[40]

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[38] *See* U.S. General Accounting Office, *Water Pollution: More EPA Action Needed to Improve the Quality of Heavily Polluted Waters* (GAO/RCED-89-38, Jan. 1989). Technically, a point source's compliance with water quality standards is usually measured at the edge of a designated area called a "mixing zone" that allows some dilution of the effluent.

[39] EPA, *National Water Quality Inventory, 1988 Report to Congress* 1 (EPA 440-4-90-003, April 1990). Furthermore, for the 29% of stream miles that have been evaluated, the reliability of the available data is questionable because of the inconsistent and imprecise methods that have often been used to assess water quality. *Id.* at 3.

[40] *Id.* at 1-3.

new permits for wastewater treatment and industrial discharges may be blocked, and economic growth and development will be impaired. New treatment facilities employing state-of-the-art technologies are vastly more efficient than older plants in removing pollutants during the wastewater treatment process. Moreover, under the court's holding, many states and their political subdivisions may be unable to properly dispose of municipal and industrial wastes. Thus, the Tenth Circuit's holding works to the detriment of the public health, safety and welfare—an outcome directly contrary to the purpose and objectives of the Clean Water Act. Restoration of the integrity of the nation's waters will only be hindered by the denial of permits in such circumstances.

During the nineteen years since enactment of the 1972 Clean Water Act Amendments, the Tenth Circuit is the only court to construe the Act to forbid new permits where downstream water quality violations exist.[41] No provision of the Act even hints at, much less mandates, the Tenth Circuit's conclusion that Congress meant to absolutely ban new permits in such circumstances. Furthermore, in its administration of the Act, EPA has never taken the position that the existence of water quality violations alone excludes consideration of other factors and operates to forbid issuance of new discharge permits. The Tenth Circuit's substitution of its unprecedented construction of the statutory provisions is thus an inappropriate judicial intrusion into the administrative process and must be reversed.

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[41] The factual situation presented in this proceeding is not novel to the courts. For example, an NPDES permit allowing a discharge from a wastewater treatment plant into the heavily polluted Potomac River was contested in *Montgomery Environmental Coalition* v. *Costle*, 646 F.2d 568 (D.C. Cir. 1980). One of the questions raised was whether the effluent limitations contained in the permit were too lax in light of the condition of the receiving waters. Although the fact that the receiving waters were polluted was squarely before the D.C. Circuit, the court did not find that pre-existing violations of water quality standards mandated denial of an NPDES permit.

CONCLUSION

For the foregoing reasons, the Supreme Court should reverse the decision of the Tenth Circuit.

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Date: May 31, 1991

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

(12) (11)

Nos. 90-1262 and 90-1266

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AMICUS BRIEF OF THE COLORADO WATER CONGRESS IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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AMICUS BRIEF OF THE COLORADO WATER CONGRESS IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

Counsel for the parties to this litigation have consented to the filing of this amicus brief by the Colorado Water Congress ("CWC"). Letters from counsel for the parties are on file with the Clerk of this Court. The CWC submits this brief in support of the Petitioners.

The Colorado Water Congress is a statewide organization composed of cities, counties, water user associations, agricultural ditch and reservoir companies, water conservancy and water conservation districts, businesses, law firms, engineering firms, individuals, and Colorado State agencies interested in water matters affecting the State of Colorado and those who hold or seek to hold water rights under Colorado law.

Representative members include the cities of Aurora, Boulder, Colorado Springs, Denver, Durango, Fort Collins, Grand Junction, Pueblo, and the counties of Adams, Conejos, Delta, Eagle, Jackson, Jefferson, La Plata, Mesa, Moffat, Pitkin, Routt, Summit, and Weld. Representative water districts include the Colorado River Water Conservations District, the Northern Colorado Water Conservancy District, the Rio Grande Water Conservation District, the Southeastern Water Conservancy District, and the Southwestern Water Conservation District. Such cities, counties and districts provide water to the population of Colorado, approximately two and three quarter million people, and in combination with agricultural ditch and reservoir companies, ensure those water supplies necessary for Colorado's economy, including its irrigated farms, its businesses, and the recreational industry. Representative business members of CWC include Adolph Coors Company, CF&I Steel Corporation, Colorado Farm Bureau, Colorado Cattlemen's Association, Colorado Ski Country U.S.A., Colorado Association of Commerce and Industry, and the Rocky Mountain Oil and Gas Association.

Members of CWC hold pollutant discharge elimination permits from the State of Colorado under a permit program approved by the United States Environmental Protection Agency in accordance with the federal Clean Water Act. See C.R.S. 25-8-501 et seq. In addition, members of CWC hold water rights for beneficial use under the provisions of Colorado water law, allocated and administered according to the doctrine of prior appropriation as described in Colorado Constitution Article XVI, Sections 5 and 6; Colorado statutes, primarily the 1969 Water Rights Administration and Adjudication Act, C.R.S. 37-92-101 et seq.; and cases of the Colorado Supreme Court such as *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882) and *Colorado River Water Conservation District v. Colorado Water Conservation Board*, 197 Colo. 469, 594 P.2d 570 (1979), which upholds Colorado's instream flow program as within the doctrine of prior appropriation.

As with the other Western States carved out of the public domain by settlement policies fostered by the federal government, see *U.S. v. New Mexico*, 438 U.S. 696 (1978), Colorado's strength and well-being is directly dependent on its ability to store the Spring snowmelt high up in the watershed, to divert directly from the streams when the water is running high, and to release from storage, particularly after mid-July when natural flow declines to extremely low levels. The ability to meet the year-round water demand of cities, businesses and farms is inextricably tied to water released from reservoirs. In addition, the Front Range of Colorado, east of the Continental Divide, receives annual precipitation of from 12 to 15 inches and is dependent on supplemental transmountain diversions from Colorado's Western Slope. *See United States v. Northern Colorado Water Conservancy District*, 608 F.2d 422 (10th Cir. 1979). Colorado's hydrologic cycle and the key role of water storage and development to States like it and Wyoming were addressed by this Court in *Wyoming v. Colorado*, 259 U.S. 419, 457-458 (1922).

As the quintessential upstream State, comprising the headwaters of the Platte, Arkansas, Colorado, and Rio Grande Rivers, Colorado participated in nine interstate compacts and several equitable apportionment cases allocating among sister States waters arising within and flowing from the state.[1] See e.g., *Colorado v. New Mexico*, 467 U.S. 310 (1984); *Nebraska v. Wyoming*, 352

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[1] In fact, in certain instances the states have jointly addressed water quality concerns as evidenced by Article IX of the 1965 Arkansas River Basin Compact between Kansas and Oklahoma:

> The states of Kansas and Oklahoma mutually agree to:
>
> A. The principle of individual state effort to abate man-made pollution within each state's respective borders, and the continuing support of both states in an active pollution-abatement program;

U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922). Eighteen states are direct recipients of water originating in Colorado, as are a number of Indian tribes. See section 518(e), 33 U.S.C. § 1377(e). Consequently, Colorado has closely scrutinized policies, decisions and regulatory developments which could adversely affect development of its legal share of the water resource.

Colorado is also the home of the McCarran Amendment cases which interpret and apply the provisions of 43 U.S.C. § 666 governing the joinder of the United States' water rights claims in State forums. *See United States v. District Court for Eagle County*, 401 U.S. 520 (1971), *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982), and *United States v. Bell*, 724 P.2d 631 (1986). Such cases involved the creation, scope, administration and priority of rights to water claimed to arise by the establishment of federal land reservations. CWC and its members were actively involved in each of those cases.

With the advent of major federal environmental Acts, such as the Clean Water Act, CWC and its members have become increasingly concerned that the misapplication of federal water quality laws could undermine the water allocation law of the States. Section 101(g) of the

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B. The cooperation of the appropriate state agencies in Kansas and Oklahoma to investigate and abate sources of alleged interstate pollution within the Arkansas river basin whenever such matters are called to their attention by the commission;

C. Enter into joint programs for the identification and control of sources of natural pollution within the Arkansas river basin which the commission finds are of interstate significance;

D. The principle that neither state may require the other to provide water for the purpose of water-quality control as a substitute for adequate waste treatment;

E. Utilize the provisions of the federal water pollution control act in the resolution of any pollution problems which cannot be resolved within the provisions of this compact.

Clean Water Act, 33 U.S.C. § 1251(g), provides that the authority of each State to allocate quantities of water shall not be superseded, abrogated or otherwise impaired by programs under the Clean Water Act, nor shall the Act supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies are directed to cooperate with State and local agencies "to prevent, reduce and eliminate pollution in concert with programs for managing water resources." Thus, the Clean Water Act is an exercise in fundamental federalism designed to achieve a national program of water quality control implemented on a State by State basis to protect beneficial uses, thereby supporting and not undermining the allocation, administration, and development of each State's allocated water resource. *See*, generally, Hobbs and Raley, "Water Rights Protection in Water Quality Law," 60 *Univ. Colo. L. Rev.* 841, 872 (1989).

The State of Colorado, CWC, and its members have participated in a number of cases seeking careful application of the policies of the Clean Water Act, including the policy of controlling the discharge of pollutants and the policy of respecting State water allocation and administration systems and water rights created under them. Such cases include the Colorado River Basin salinity control case, *Environmental Defense Fund v. Costle*, 657 F.2d 275 (D.C. Cir. 1981); the section 404 nationwide permit dam construction case, *Riverside v. Andrews*, 758 F.2d 508 (10th Cir. 1981); the reservoir release discharge of pollutants case, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); the section 208 water quality planning case, *Northern Colorado Water Conservancy District v. Board of County Commissioners*, 482 F. Supp. 1115 (D. Colo. 1980); the "waters of the United States" point source discharge permit case, *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979); and the clear water reservoir release case, *A-B Cattle Co. v. United States*, 196 Colo.

539, 589 P.2d 57 (Colo. 1978). Each of these cases is important to this Court's consideration of the Federal/State balance struck by Congress in the law and policies applicable to the interface between federal water quality law and State adjudicated water rights.

Finally, the past investment of CWC members in water development projects, such as dams and reservoirs, and in wastewater treatment facilities, will be put at risk as continued operation thereof may be placed in jeopardy. Necessary future projects will be hampered by the uncertainty arising from the need to meet all downstream water quality standards which are constantly subject to change, and which, according to the lower Court, include a prohibition against discharge where current downstream violations exist. Long range financial planning and bonding may become impossible, and the State's economic well-being will be placed in doubt.

The decision of the Tenth Circuit bestows upon an individual downstream State veto authority over water use and development in upstream States, is counter to the provisions and policy of the Clean Water Act governing interstate pollution matters, and encourages States to improve upon their allocated water resource by adopting state line water quality and land use designations which will lock out further upstream water use and discharges even though they meet the goal and letter of the Clean Water Act's State-by-State classified use and water quality standards program.

SUMMARY OF ARGUMENT

The Tenth Circuit decision effectively provides downstream states with virtual veto authority over discharge activities located in an upstream state. In addition, it establishes an absolute prohibition against any additional point source discharges to those waters where violations already exist if such discharges will contribute to the condition that produced the violation. These additional

contributions need not even be detectable. This ruling, which is conflict with the prior holdings of this Court in *International Paper Company v. Ouellette*, 479 U.S. 481 (1987), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), could foreclose future upstream development in a headwater state such as Colorado while, at the very least, leading to destructive disputes between the states over the presence of downstream impacts, the propriety of downstream standards and policies, and the appropriate allocation of water resources.[2]

The Circuit Court decision is inconsistent with the statutory scheme embodied in the various pertinent provisions of the Clean Water Act. Congress made a conscious distinction in Sections 301, 302 and 303 of the Act between "federal" standards and effluent limitations, and those adopted by the states. There is no indication that state standards were to have direct extraterritorial application. However, pursuant to Section 401 of the Act, where a federal license or permit was necessary, affected states could put their objections of record. Similarly, pursuant to Section 402(b)(5), such states could "make "recommendations" to the permitting state relative to applications pending in the permitting state. An accommodation process, with EPA oversight, was the key to insuring interstate equity while preserving state sovereignty. The Tenth Circuit opinion totally undermines this result.

The Circuit Court opinion will have similarly disastrous results if it is applied, as it must be, to certain new elements of state water quality standard programs, such as water quality standards for wetlands, biocriteria, and Section 319 nonpoint source controls. Each of these programs, which EPA is demanding be incorporated into the state water quality standards regulatory process, will control hydrologic modifications in order to ostensibly protect the

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[2] The CWC will not independently discuss the governing case law, but will rather adopt by reference the arguments made by Petitioner, State of Arkansas, and *amicus*, State of Colorado.

"biological" integrity of downstream aquatic resources. This could seriously disrupt water supply operations in arid or semi-arid upstream states such as Colorado, where existing flows are diverted, used and reused, pursuant to the prior appropriation doctrine, in order to meet agricultural, municipal and industrial needs.

ARGUMENT

I. THE TENTH CIRCUIT MISCONSTRUED THE RELEVANT PROVISIONS OF THE FEDERAL ACT

In rendering its decision, the Tenth Circuit cited various provisions of the Clean Water Act, indicating that one must "look to the CWA as a whole" in determining whether a discharge permit must insure compliance with the applicable water quality standards of all affected states. *State of Oklahoma v. E.P.A.*, 908 F.2d 595, 606 (10th Cir. 1990). However, just such a review inexorably leads to the conclusion that the Tenth Circuit decision must be overturned,

A. The Tenth Circuit Misinterpreted Section 301 (b)(1)(C)

Once water quality standards are established by a state pursuant to Section 303 of the federal Act, effluent limitations are applied to point source dischargers for purposes of ensuring that such standards are met. Pursuant to Section 301(b)(1)(A) and (B), 33 U.S.C. § 1311 (A) (B), technology-based effluent limitations are to be achieved by a date certain, including secondary treatment for publicly-owned treatment works. Section 301(b) (1)(C), 33 U.S.C. § 1311(b)(1)(C), then further directs the achievement of

> . . . any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, *established pursuant to any state law* or regulations (*under authority preserved by § 510* of this title) or any other Federal law or regulation, *or required to implement any applicable water quality standard established pursuant to this chapter.* (emphasis added)

The Tenth Circuit concluded that this provision would "require dischargers to meet the applicable requirements of other affected states". *Oklahoma*, 908 F.2d at 606. However, this determination by the Court is rebutted by the clear language of the statute.

Section 301(b)(1)(C), on its face, simply states that limitations must be imposed which are "necessary to meet water quality standards . . . established pursuant to any state law or regulations (under authority preserved by § 510 of this title . . . ." Section 510, 33 U.S.C. § 1370, in turn, provides in part:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any state or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is *in effect under this chapter*, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation . . . which is less stringent . . . . (emphasis added)

Hence, the state standards to which reference are made in Section 301(b)(1)(C) are something *other than* standards "in effect under this chapter." That is to say, they are not the "federal law" to which the Tenth Circuit made reference in justifying its decision. *Oklahoma*, 908 F.2d at 607.

The distinction found in Section 510 between state-adopted standards and federal criteria is then further highlighted in Section 301(b)(1)(C) as quoted above,

wherein reference is made to limitations "established pursuant to any state law . . . *or* required to implement any applicable water quality standards established pursuant to this chapter." (emphasis added) This phrase indicates Congressional intent that there be a demarcation between standards established under state law, which standards need EPA approval (§ 303(c)), and standards established pursuant to the Act. If, as the Tenth Circuit concludes, EPA-approved state standards are "federal law," such state standards would indeed be "established pursuant to this chapter," and the distinction rendered meaningless. However, each word of a statute must be given meaning and interpreted according to its plain terms. *Garcia v. U.S.*, 469 U.S. 70 (1984); *Bushkin Assoc., Inc. v. Raytheon Company*, 906 F.2d 11, 14 (1st Cir. 1990). Hence, though Section 301(b)(1)(C) does not directly address the ability of one state to impose its water quality standards upon another state, the only fair reading of the statutory scheme runs counter to the lower Court's conclusion.

B. Section 302 Of The Act Militates Against The Tenth Circuit Conclusion

Aware of the fact that the effluent limitations established pursuant to Section 301 would not necessarily result in the attainment of the desired water quality, Congress provided, in Section 302 of the Act, 33 U.S.C. § 1312, for the establishment of "water quality related effluent limitations" for specific categories of pollutants. These limitations were to be more stringent requirements based not upon available technology, but rather upon the quality of the water in the stream. The Tenth Circuit took great comfort in the fact that Section 302 references "water quality in a specific portion of the navigable waters," and not "intrastate water quality effects." *Oklahoma*, 908 F.2d at 615.

> Indeed the statute's use of the term "specific portion of the navigable waters" . . . rather than specifying waters of the source or permitting state, suggests that the section contemplates regulation of water quality without regard to state boundaries. Vesting authority in EPA, instead of in individual states, arguably suggests a similar intent.

Oklahoma, 908 F.2d at 615.

Section 302 of the Act, not unlike Section 301, does not directly address the issue of interstate application of mandated water quality controls. However, the 1987 amendments to Section 302, amendments which were not cited by the lower Court, specifically provide for modification by the Administrator of effluent limitations established thereunder "with the concurrence of the State." § 302(b)(2), 33 U.S.C. § 1312(b)(2). Thus, not only was the Tenth Circuit's insistence upon strict compliance statutorily waived, but concurrence of "the State" and *not* "all affected States," was to be sought.

Finally, the Circuit Court conclusion that "vesting of authority in EPA, instead of in individual states," supports the concept of interstate application of state-adopted water quality standards is simply contrary to the Court's express justification for requiring compliance with the water quality standards of affected states, i.e., that EPA-approved state standards constitute federal law. Under this scenario, state adoption of water quality standards places the individual states in the position of EPA, and the distinction between state and federal authority once again becomes moot. There would simply be no need to vest authority in the federal agency. Thus, though there may be merit in the Court's observation that the vesting of authority in a "federal" agency (EPA) indicates a desire to effectuate regulations with interstate application, its determination that this suggests approval of "state" veto power over out of state permits does not logically follow.

C. Section 303 Of The Act Indicates That States Have Jurisdiction Only Over Activities Within Their Boundaries

Congress, cognizant of the fact that technology-based limitations would not, in every instance, be adequate to meet water quality standards, adopted the concept of total maximum daily loads (TMDL's) in Section 303(d) of the Act, 33 U.S.C. § 1313(d).

> (1)(A) Each state shall identify those waters *within its boundaries* for which the effluent limitations required by Section 301(b)(1)(A) and Section 301(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall *establish a priority ranking* of such waters, taking into account the severity of the pollution and the uses to be made of such waters . . .
>
> (C) Each state shall establish for the *waters identified in paragraph (1)(A)* of this subsection, and in accordance with the priority ranking, the total maxmium daily load [TMDL], for those pollutants which the Administrator identifies under Section 304(a)(2) of this title, as suitable for such calculation. *Such load shall be established at a level necessary to implement the applicable water quality standards* with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. (emphasis added)

Therefore, each state was to calculate TMDL's for waters "within its boundaries" in order to meet water quality standards. Had Congress desired to establish "interstate" wasteload allocations, it could have so provided by statute. It did not do so. It is not now for the judiciary to fashion such a program.[3] *See, Chevron, U.S.A., Inc. v.*

[3] Congress did identify, in Section 208(a) of the Act, 33 U.S.C. § 1288(a), a process for dealing with areas which have "substantial water quality control problems" and are loctaed in two or more states. This provision calls for joint consultation and cooperation in the development of area-wide waste treatment management plans. This is a far cry from the veto authority provided to one state under the Tenth Circuit opinion.

Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984).

Further, contrary to the Circuit Court decision, Section 303(d) does not mandate either immediate compliance with existing violations of water quality standards, or a prohibition against new discharges to the offending stream segment. Rather, it allows states the flexibility to establish a "priority ranking" in remediating the problems, and to permit new discharges so long as they are incorporated into the TMDL process.

The provisions of Section 303 are also of vital significance in analyzing the propriety of the Tenth Circuit decision for one additional reason. It is pursuant to this section that states promulgate the water quality standards which are the cornerstone for the regulatory process in question. Notice of a rulemaking for purposes of adopting such standards on an individual state level is provided in accordance with the mandates of state law, and disseminated on a state-wide basis. Colorado, for example, utilizes a Water Quality Information Bulletin for those on the mailing list, and publishes notice in the official state register. A hearing is then held before the appropriate state agency, standards are adopted by the state agency, and the standards are then submitted to EPA for approval pursuant to Section 303(c) of the Act, 33 U.S.C. § 1313(c). So long as the standards are more stringent than federal requirements, EPA has no choice but to approve the standards. *Homestake Min. Co. v. E.P.A.*, 477 F. Supp. 1279, 1284 (D. S.D. 1979). Notice of the action taken by EPA may then appear in the Federal Register. *See*, 40 C.F.R. § 131.21(d).

It is clear from the above procedural outline that if the Tenth Circuit decision is a correct analysis of the

federal Act, those critically affected by the standard setting process are not a party to the rule-making proceedings, and in fact receive no notice thereof. However, as stated by this Court in *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978), the Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. *See also, Florida Gas Transm. Co. v. F.E.R.C.*, 876 F.2d 42 (5th Cir. 1989). Under Colorado law, a water right is a vested property right. *Public Service Co. of Colorado v. F.E.R.C.* 754 F.2d 1555 (10th Cir. 1985); *Wiebert v. Rothe Bros., Inc.*, 200 Colo. 310, 618 P.2d 1367 (1980); *see also, Hinderlider v. Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102, (1938). Given the dramatic effect, under the lower Court decision, which the promulgation of water quality standards by lower basin states could have upon the exercise of upstream water rights, all upper basin states would be entitled to APA notice. *See*, 5 U.S.C. § 553. However, such notice is not current provided, disclosing but one more reason why the Tenth Circuit decision is in error.

D. The Language Of Section 401 Of The Act Does Not Support The Tenth Circuit Conclusions

Section 401 of the federal Act, 33 U.S.C. § 1341, established a process whereby a state has the opportunity to certify that "any applicant for a federal license or permit to conduct any activity" will meet the applicable water quality requirements of the Act as adopted by the state. Though this section does provide a mechanism for considering the views of affected downstream states, the Circuit Court's analysis of the significance of this language is overly simplistic. Section 401(a)(2), 33 U.S.C. § 1341(a)(2), states in part:

> Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other state, the Administrator . . . shall so

> notify such other state, the licensing or permitting agency, and the applicant. If . . . such other state determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such state, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. *The Administrator shall at such hearing submit his evaluation and recommendations* with respect to any such objection to the licensing or permitting agency. *Such agency, based upon the recommendations of such state, the Administrator, and upon any additional evidence*, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance, such agency shall not issue such license or permit. (emphasis added)

Therefore, pursuant to Section 401, it is the Administrator, not the potentially impacted state, who determines if the discharge may affect the quality of waters of that state. Should the Administrator make such a determination of possible impact, there is no requirement of automatic and unequivocal compliance with the water quality requirements of the affected state, but rather the Administrator submits an "evaluation and recommendation" to the permitting agency. The permitting agency then considers the recommendation, along with other tendered evidence, in determining what conditions he believes appropriate to insure conformance with applicable water quality requirements. Rather than automatic compliance, there is a weighing and balancing of the evidence heard.[4]

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[4] It must not be forgotten that EPA also considers a state's antidegradation policy to be a part of its water quality standards program. 40 C.F.R. 131.12. Under the federal policy, no degradation is permitted of the highest quality waters even though existing

Further, Section 401 is addressed solely to situations where there exists issuance of "federal licenses or permits." Many discharge permits, whether issued in the first instance or upon renewal by delegated state agencies, would not require such certification. Congress evidently saw fit to single out federally approved projects discharging to interstate waters for closer scrutiny. However, this certainly does not indicate a Congressional desire to promote confrontation between the states in the implementation of their general permitting programs. In fact, though the federal regulation governing Section 401 certification (40 C.F.R. § 121.2(a)(3)) requires a statement "that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards," the term "water quality standards" is defined in the regulations as follows:

> (g) "Water quality standards" means standards established pursuant to § 10(c) of the Act, *and state-adopted water quality standards* for navigable waters which are *not interstate waters.* (emphasis added)

40 C.F.R. § 121.1(g). Thus, Section 401 certification review by the very terms of the pertinent federal regulations, is limited to a determination that there will be no exceedence of "federal" standards adopted by EPA under

uses would be fully protected. 40 C.F.R. § 131.12(a)(3). Limited degradation is permitted in certain other waters "if allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." 40 C.F.R. § 131.12(a)(2). The policy applies to point and nonpoint sources alike. EPA, Questions and Answers on Antidegradation, August 1985. *If* the Circuit Court decision is correct, downstream states would not only be prohibiting upstream development where the highest quality waters lay below such activities, but would be making determinations about the economic and social utility of projects in other states for remaining waters, even though the development would probably *not* be occurring in the downstream state. This would give rise to untold inequities and jurisdictional disputes.

the Act, or state promulgated standards for wholly *intrastate* waters. The certification would not even include review of state adopted standards for interstate waters, the type of waters at issue in the Tenth Circuit opinion.

E. The Permitting Provisions Of Section 402 Only Allow For Recommendations By The Affected State

Section 402 of the Act, 33 U.S.C. § 1342, establishes the discharge permit system. Specifically, Section 402(d)(2), 33 U.S.C. § 1342(d)(2), as cited by the Tenth Circuit, provides in part:

> (2) No permit shall issue (A) if the Administrator within ninety days of the date of his *notification under Subsection (b)(5)* of this section objects in writing to the issuance of such permit or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the state, objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter . . . (emphasis added)

Subsection (b)(5), as cross-referenced, states:

> The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:
>
> • • • •
>
> (5) To insure than any State (other than the permitting State) whose waters may be affected by the issuance of a permit *may submit written recommendations* to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing; (emphasis added)[5]

[5] The Circuit Court's conclusion that § 402(b)(5) "derives from § 401," *Oklahoma* 908 F.2d at 612, is totally unsubstantiated by anything in the Act or its legislative history.

Hence, though affected downstream states can make "recommendations" to the permitting state and the Administrator, this does not support, and indeed is contrary to, any conclusion that there must be absolute compliance with the water quality standards of the downstream state.

In addition, though it is true that Section 402(b)(1)(A) of the Act, 33 U.S.C. § 1342(b)(1)(A), generally requires compliance with water quality standards and effluent limitations, the Tenth Circuit's reliance upon this provision ignores the accepted principle of statutory construction whereby the specific provision controls over the general *HCSC-Laundry v. United States*, 450 U.S. 1, 5 (1981). In this case, the specific provisions addressing interstate disputes mandate the previously-referenced balancing process.

Finally, it is curious that the lower Court, in its discussion of Section 402, completely failed to note what is a key provision in the resolution of this controversy. Section 402(b), 33 U.S.C. § 1342(b), entitled "State permit programs," bestows permitting authority upon the states in the following words:

> At any time after the promulgation of the guidelines required by subsection (i)(2) of Section 304 of this title, the governor of each state desiring to administer its own permit program for discharges into navigable waters *within its jurisdiction* may submit to the Administrator a full and complete description of the program it proposes to establish and administer *under State law or under an interstate compact.* (emphasis added)

Waters located outside the state, such as the waters of the Illinois River within Arkansas, are *not "within* [the] jurisdiction" of Oklahoma, and thus not subject to its discharge permit program. *See, United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). Any extraterritorial permitting authority would depend upon

the execution of a compact agreement. *See also, Hinderlider v. La Plata & Cherry Ditch Co.*, 304 U.S. 92 (1938).

F. Section 505 Of The Act Indicates An Intent To Enforce Only In-State Requirements

The Tenth Circuit's reliance upon Section 505(h), 33 U.S.C. § 1365(h), is similarly misplaced. Under this provision,

> A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter *the violation of which is occurring in another State* and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State. (emphasis added)

Section 505(h) specifically establishes two conditions which must be met before its provisions can be invoked by the Governor of an affected state. First, there must be a failure to enforce a standard or effluent limitation, the violation of which is occurring *in another state.* Second, that violation must be causing an adverse effect on the public health or welfare in the affected state, or a violation of a water qualtiy requirement in the affected state. The initial triggering condition is, therefore, a violation occurring in the *state of discharge*, which violation remains unpunished. The facts before the Tenth Circuit involved a potential violation in the downstream (affected) state without a concomitant violation in the upstream state. Hence, Section 505(h) was of limited utility in rendering a decision in the Oklahoma/Arkansas dispute. However, Section 505(h) does run contrary to the general conclusions reached by the Circuit Court, as Congress simply could have given the Governors of affected downstream states the power to sue for a violation of

the downstream state's standards by out-of-state dischargers if that was indeed its intent.

G. Section 101(g) And The Governing Case Law Supports EPA Authority Under The Act

A paradigm case upon interstate water quality dispute is *Environmental Defense Fund Inc. v. Costle*, 657 F.2d 275 (D.C. 1981) where it was argued unsuccessfully by EDF that EPA had failed under the Clean Water Act to require the adoption of State line salinity control water quality standards in each of the seven States of the Colorado River Basin: Colorado, Wyoming, Utah, New Mexico, Arizona, Nevada, and California. *See EDF*, 657 F.2d at 287-288. The seven basin state Salinity Control Forum was organized to address salinity control measures, including restrictions in point source discharge permits written by each State and subject to veto by EPA and nonpoint source on-farm salinity control projects, in order to reduce salinity loading between and among the States which could adversely affect classified water uses in each of the States. *EDF*, 657 F.2d at 282, 297-298. The primary motivation for the interstate salinity control cooperative approach approved in this case was to allow, and provide for, the continued development of each of the States' share of Colorado River Compact water, free from the threat of an individual State attaching restrictive salinity water quality standards enforceable on an upstream state. Otherwise, the "Law of the River" applicable to water allocations would surely have given way to State-by-State preemption of the compact allocations in the guise of honoring a downstream State's water quality and land use designations. The *EDF v. Costle* Court determined that the EPA Administrator had ample cause and authority to address the complex matter of interstate water pollution through a combination of the Agency's regulatory authority and working with State authorities within the framework of the water quality standards program, 33 U.S.C. § 1313.

Similarly, in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1182), the Court observed that section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g), evidenced Congressional intent not to "interfere any more than necessary with state water management" and to minimize federal control over state decisions on water quantity." The Court recognized that reservoirs are key to making use of water in a State, and that EPA was correct in not categorizing releases from dams as a point source of pollution. *NWF*, 693 F.2d at 178, 179.

Admittedly, the facts before the Tenth Circuit in the Oklahoma/Arkansas case involve a point source of pollution. However, every act of withdrawing and using a quantity of water under State water law involves some diminution or change in the quality of that water as a result of being used. Return flows to a water short river system from prior uses are a key component of the water resource available to fill the appropriations of downstream water users. *See, Comstock v. Ramsay*, 55 Colo. 244, 248, 133 P. 1107, 1108 (1913). The return flow which percolates back into the soil, or is conveyed back to the stream by a point source, is used and reused by downstream water users. The Colorado water courts are in the daily business of defining historic consumptive use and adjudicating junior water rights and changes of water rights, including plans of augmentation and exchange, for use of the return flows. *See*, e.g., *Weibert v. Rothe Brothers, Inc.*, 200 Colo. 310, 316-17, 618 P.2d 1367, 1371-72 (1980). A water quality policy which prevents additional water uses upstream undermines the upstream State's ability to put its allocated water resource to beneficial purposes under State law. In fact, an overly restrictive water quality policy discouraging return flows from point sources encourages evaporative, consumptive treatment techniques which diminish the quantity of water available back to the stream for downstream uses, adversely affecting instream flows. See *Pulaski Irrigation Ditch Co. v. Trinidad*, 70 Colo. 565, 569, 203 P. 681, 683 (1922).

Zero discharge was a goal tempered by practicality. *NWF*, 693 F.2d at 181. This Court should read section 101(g) as precluding interpretation of the Clean Water Act in a manner which would allow a downstream State to unilaterally enforce its water quality standards and land use designations on upstream States.

II. THE TENTH CIRCUIT DECISION WILL UNDERMINE APPLICATION OF RECENT EPA POLICIES AND REGULATIONS

In holding that activities in upstream states must comply absolutely with the water quality standards of all downstream states, the Tenth Circuit not only misinterpreted the pertinent provisions of the Clean Water Act, but also failed to analyze the far-reaching impacts of its holding upon the implementation of recent EPA policies and regulations.

A. The Circuit Court Decision Will Disrupt Water Allocation In Promoting Wetland Protection

In its July, 1990, National Guidance for Water Quality Standards for Wetlands, EPA stated:

> In addition to other narrative criteria, narrative biological criteria provide a further basis for managing a broad range of activities that impact the biological integrity of wetlands and other surface waters, particularly physical and hydrologic modifications. *For instance, hydrologic criteria are one particularly important but often overlooked component to include in water quality standards to help maintain wetlands quality.* Hydrology is a primary factor influencing the type and location of wetlands. . . . *States should consider the establishment of criteria to regulate hydrologic alterations to wetlands.* (emphasis added)

Thus, assuming the legal propriety of this provision, if a downstream state were to adopt hydrologic criteria as part of its water quality standards program, and if that

criteria were applicable to upstream states, the downstream state would in effect be controlling the very flow of the river in enforcing its standards. This would be the case despite the fact that there existed no discharge of pollutants to the waterway. The potential effect of such a provision upon appropriators within an upstream state such as Colorado, as well as upon interstate compact apportionments, is apparent. New upstream appropriations, which inevitably reduce flows, could be prohibited, while full development by the upstream state of its compact entitlements could be foreclosed.

B. The Circuit Court Opinion Will Lead To A Disruptive Application Of Biocriteria Requirements

In April, 1990, EPA published a document entitled: "Biological Criteria, National Program Guidance for Surface Waters." In this publication, EPA indicated that "to meet the objectives of the Act and to comply with statutory requirements under §§ 303 and 304, states are to adopt biological criteria in state standards." *Id.* at 3. As defined by EPA:

> Narrative biological criteria are definable statements of condition or attainable goals for a given use designation. They establish a positive statement about aquatic community characteristics expected to occur within a water body (e.g., "aquatic life shall be as it naturally occurs" or "a natural variety of aquatic life shall be present and all functional groups well represented").

Id. at viii.[6] EPA then continues:

> To develop values for biological criteria, states should (1) identify unimpaired reference water bodies to establish the reference condition and (2) characterize

[6] EPA has further indicated that "supporting statements for the criteria should promote water quality to protect the *most natural community possible* for the designated use." (emphasis added) *Id.* at 15.

> the aquatic communities inhabiting reference surface waters. Currently, two principal approaches are used to establish reference sites: (1) The site-specific approach, which may require upstream-downstream or near field-far field evaluations, and (2) the regional approach, which identifies similarities in the psysico-chemical characteristics of watersheds that influence aquatic ecology.

Id. at viii. If an impairment of use is found, the causes, be they "chemical, physical, [or] biological stress" are diagnosed, including habitat degradation, and plans are developed to address the problem. "Violation of biological criteria is sufficient cause for states to initiate regulatory action." *Id.* at 14.

Once again, if biocriteria is incorporated into the water quality standards program of the downstream state, and if it is strictly enforceable against the upstream state, absolute protection of the biological integrity of downstream river segments may demand that there be no further modification in the flow regime. Existing flows may be necessary to meet fish or plant needs, or to dilute other sources of pollution. In fact, the necessary control program designed to attain reference reach conditions could require changes in existing upstream practices. Not only would the downstream state be potentially interfering with upstream water diversion activities in contravention of Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g), but it may be imposing land use controls for purposes of attenuating nonpoint source pollution. This would inevitably lead to a bitter confrontation not currently contemplated under the Act.

C. The Circuit Court Opinion Is Inconsistent With A Reasoned Application Of Section 319

Finally, it must be acknowledged that a large portion of the remaining surface water pollution in the United States is a result of nonpoint sources. *See, Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1424 (9th Cir. 1989). In 1987, Congress amended the Act to provide that:

> It is the national policy that programs for the control of nonprofit sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

Section 101(a), 33 U.S.C. § 1251(a). Included within the various categories of nonpoint sources as identified by EPA are hydrologic/habitat modifications, agricultural practices, and urban runoff. *See,* Environmental Protection Agency, Nonpoint Source Guidance (December, 1987). Pursuant to Section 319 of the 1987 Amendments, 33 U.S.C. § 1329, the Governor of each state is to prepare a report identifying waters which "without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirments of this chapter." Section 319(a)(1)(A), 33 U.S.C. § 1329(a)(1)(A). The Governor "for that state or in combination with adjacent states" is then to prepare a management program for controlling pollution "added by nonpoint sources to the navigable waters *within the state,*" such program to include "an identification of programs (including, as appropriate, nonregulatory *or regulatory* programs for enforcement . . .) to achieve implementation of the best management practices [BMP's] by . . . particular nonpoint sources . . . ." (emphasis added) Section 319(b), 33 U.S.C. § 1329(b).[7] The program will employ BMP's in an effort to attain and maintain water quality standards.

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[7] It is also interesting to note that pursuant to Section 319(b)(3), 33 U.S.C. § 1329(b)(4), states are to ". . . develop and implement a management program under this subsection on a watershed-by-watershed basis *within such state.*" (emphasis added)

The Section 319 program is currently voluntarily in nature and driven by the prospect of federal grant funding.[8] However, if a downstream state were to promulgate a "regulatory program" to meet its water quality standards, pursuant to the Tenth Circuit opinion, the downstream state could arguably require that activities located in upstream states, such as agricultural endeavors and water diversion projects, subject themselves to the BMP's developed by the downstream state. Once again, this could lead to a chaotic situation whereby one state is attempting to regulate development activities in the upstream states.

Finally, it should be emphasized that the language of Section 319, as quoted above, specifically references the control of pollution added to the navigable waters "within the state," as well as the development of management programs on a "watershed-by-watershed basis within such state." Section 319 (b) (1) and (b) (4), 33 U.S.C. § 1329(b) (1) and (b) (4). Such Congressional pronouncements militate against *interstate* application of state non-point source controls. Yet if such is the case, assuming the Tenth Circuit holding is correct, Congress apparently chose to treat the major remaining contributors of pollutants, i.e., nonprofit sources, in a different fashion than point sources, creating the alleged "gaping loophole" of which the Circuit Court was so fearful. *Oklahoma*, 908 F.2d at 632. This analysis simply discloses the erroneous nature of the Tenth Circuit conclusion. No state was to have veto authority over either point *or* nonpoint source activities occurring in another state.

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[8] In 1990, Congress amended the Coastal Zone Management Act so as to require certain nonpoint source controls. 16 U.S.C. § 1455b. Similar attempts at adopting a uniform mandatory program under the CWA can be expected as part of the current CWA reauthorization process.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Tenth Circuit and find (1) that facilities need not comply with the water quality standards of all downstream states, and (2) that a preexisting violation of water quality standards on any downstream segment does not automatically preclude the issuance of a new permit.

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May 31, 1991

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Nos. 90-1262 and 90-1266

Supreme Court, U.S.
FILED
MAY 31 1991
OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

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v.

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Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
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THE STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF CHAMPION INTERNATIONAL CORPORATION, AMERICAN PAPER INSTITUTE, NATIONAL FOREST PRODUCTS ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, AMERICAN MINING CONGRESS, THE FERTILIZER INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, ASSOCIATED INDUSTRIES OF ARKANSAS, ARKANSAS FEDERATION OF AIR AND WATER USERS, INC., AND ARKANSAS POULTRY FEDERATION IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF CHAMPION INTERNATIONAL CORPORATION, AMERICAN PAPER INSTITUTE, NATIONAL FOREST PRODUCTS ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, AMERICAN MINING CONGRESS, THE FERTILIZER INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, ASSOCIATED INDUSTRIES OF ARKANSAS, ARKANSAS FEDERATION OF AIR AND WATER USERS, INC., AND ARKANSAS POULTRY FEDERATION IN SUPPORT OF PETITIONERS

Champion International Corporation, the American Paper Institute, the National Forest Products Association,

the American Iron and Steel Institute, the American Mining Congress, The Fertilizer Institute, the Chemical Manufacturers Association, the National Association of Manufacturers, the Associated Industries of Arkansas, the Arkansas Federation of Air and Water Users, Inc., and the Arkansas Poultry Federation ("industry *amici*") file this brief *amici curiae* in support of petitioners State of Arkansas, *et al.*, and request that the decision of the lower court be reversed.[1]

INTERESTS OF *AMICI CURIAE*

Industry *amici* represent private manufacturing, processing, mining, and other companies whose interests are vitally affected by the lower court's rulings interpreting the Clean Water Act.

The American Paper Institute is a non-profit trade association whose members include companies which account for approximately 90 percent of the domestic manufacture of pulp, paper, and paperboard, many of whom own or operate facilities which discharge treated process wastewater to interstate waterways or their tributaries in conformance with the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988).[2]

Champion International Corporation ("Champion") is a member of the American Paper Institute and one of the

[1] Industry *amici* also agree with petitioner U.S. Environmental Protection Agency ("EPA") that the lower court's decision should be reversed, but oppose any suggestion that an affected downstream state's water quality standards automatically or strictly apply to an out-of-state source.

The consent of counsel for each of the parties has been obtained and a letter from each counsel indicating his consent to the filing of this brief has been filed with the Clerk.

[2] Citations in this brief are to the Federal Water Pollution Control Act, as amended, commonly referred to as the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1251-1387 (1988). Parallel citations to the United States Code are provided in the Table of Authorities.

nation's largest producers of pulp, paper, and solid wood products. Champion owns and operates numerous mills and other facilities in North Carolina, Florida, Michigan, and elsewhere which discharge treated process wastewater to interstate waterways in accordance with Clean Water Act permits issued under the National Pollutant Discharge Elimination System ("national discharge" or "NPDES" permits), CWA § 402. Champion's Canton, North Carolina mill, which discharges treated process wastewater to a river that flows into Tennessee some 26 miles below the mill, has been the subject of a long-standing dispute between the States of North Carolina and Tennessee over the applicable "color" standard for a renewal of the Canton mill's national discharge permit.[3]

Champion also operates and is seeking an NPDES renewal permit for a mill in Pensacola, Florida, which discharges treated process wastewater to a stream that empties into Perdido Bay (a boundary water between Florida and Alabama), to which the State of Alabama has objected.[4] In both of these cases, the "affected states" of

[3] Champion is currently a petitioner before the U.S. Court of Appeals for the Fourth Circuit regarding an EPA-issued NPDES renewal permit for the Canton, North Carolina mill, in which EPA's reliance upon Tennessee's federally-approved water quality standard for color is at issue. *Champion Int'l Corp. v. EPA*, No. 91-2302 (4th Cir. *petition filed* Jan. 3, 1991). In denying Champion's request for an evidentiary hearing on the applicability of North Carolina's own federally-approved color standard—which EPA rejected *without* a finding of any "undue impact on interstate waters" in Tennessee—the EPA Administrator cited and relied upon the Tenth Circuit's decision below in *State of Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990). Briefing has been suspended pending a decision by this Court in the present case.

[4] The Attorney General of Alabama has filed a request for an evidentiary hearing on a recent EPA-issued renewal permit for Champion's Pensacola, Florida mill. The basis of Alabama's request is that the permit fails to insure compliance with Alabama's water quality standards, including its "non-degradation" policy, in keeping with the Tenth Circuit's decision below. EPA has not yet ruled on whether to grant Alabama's hearing request.

Tennessee and Alabama have contended that their differing or more stringent state water quality standards must be met by Champion's out-of-state discharges. These two cases illustrate the problem which the Tenth Circuit's decision poses for industrial discharges to interstate waterways and their tributaries.

The National Forest Products Association, the American Iron and Steel Institute, the American Mining Congress, The Fertilizer Institute, and the Chemical Manufacturers Association are national trade associations of the timber, steel, mining, fertilizer, and chemical industries, respectively, each representing a majority of the companies within their respective industries, many of whom discharge treated process wastewater to interstate waterways or their tributaries in conformance with the Clean Water Act.

The National Association of Manufacturers is a national organization which represents the business interests of large and small manufacturers, including their interest in the proper administration of the Clean Water Act with respect to discharges to interstate waterways.

The Associated Industries of Arkansas, the Arkansas Federation of Air and Water Users, Inc., and the Arkansas Poultry Federation are statewide associations which collectively represent a majority of Arkansas manufacturing companies, many of whom discharge treated process wastewater directly to interstate waterways or into publicly-owned treatment works (such as the City of Fayetteville's treatment plant) which discharge to interstate waterways.

The two principal statutory rulings of the Tenth Circuit under review by this Court are that the Clean Water Act

(1) forbids the permitting of any discharge to an interstate waterway in Arkansas (or any other "source state") unless the permit also insures compliance with the state water quality standards of Oklahoma (or any other "affected state"), and

(2) forbids the permitting of any new or increased discharge to a waterway not currently meeting applicable water quality standards.

These two *unprecedented* Clean Water Act rulings are a radical departure from past administrative and judicial interpretations of the Act. If upheld, they will fundamentally change the way the Clean Water Act affects industrial, municipal, and other discharges to interstate waterways. No longer will a discharger to an interstate waterway be able to rely, for Clean Water Act compliance purposes, solely or even principally on the federal and state laws and regulations which apply in the discharger's home state. No longer will a state "downstream" from a proposed discharge merely have the right to "object" on a case-by-case basis and "recommend" that its differing or more stringent water quality standards be considered in a particular permit. Instead, under the Tenth Circuit's decision, EPA is required to *insure* that *every* proposed discharge to an interstate waterway will comply with the water quality laws and regulations of *every* potentially affected downstream state, to whatever extent the downstream state's water quality standards or other requirements are different from or more stringent than those of the source state.

For the first time, EPA is virtually compelled by the Tenth Circuit's decision to adopt complex new procedures requiring the submission of advance demonstrations, certifications, or similar means of insuring, if possible, that all downstream state standards will be met, in every case, by a newly-permitted upstream state discharge. The lower court's decision thus will impose substantial new Clean Water Act permit burdens—and potential new control requirements or discharge prohibitions—on thousands of new and existing industrial, municipal, and other facilities which propose new, increased, or continued discharges of treated process wastewater to interstate rivers and streams, lakes

and reservoirs, bays, estuaries, and coastal waters nationwide.

For example, a discharger located in northeast Ohio on a tributary of the Ohio River will be required to show that its discharge will not have the potential to cause or contribute (even by an *undetectable* amount, according to the Tenth Circuit) to the violation of any different, additional, or more stringent water quality standards adopted by the downstream states of Pennsylvania, West Virginia, Kentucky, Indiana, Illinois, Missouri, Tennessee, Arkansas, Mississippi, and Louisiana. To try to prevent the possibility that any newly-proposed downstream state standards might preclude the construction, expansion, or continued operation of its Ohio-based facility, the Ohio source will have to participate in the water quality standards-setting activities of all these downstream states and, if possible, make sure the downstream state standards do not present insurmountable compliance concerns beyond the standards which apply in Ohio.[5] Moreover, it can be expected that the Ohio source will have to actually *demonstrate*, in conjunction with its Ohio Clean Water Act discharge application, that no potentially relevant numerical, narrative, or "non-degradation" standards of any downstream states

[5] Prior to the Tenth Circuit's decision, most companies and municipalities operating and discharging in one state would have had no particular reason to be informed about the water quality standards of downstream states, much less have had the need or the opportunity to participate in their standards-setting activities. Now, all of a sudden, they *must* do so or suffer unacceptable future consequences. Perhaps even more important, they suddenly have become subject to hundreds of downstream state standards *already in existence*, without notice and opportunity to have been heard regarding the adoption of such standards. The Ohio-based discharger's only alternatives, with respect to existing downstream state standards, will be to attempt to comply, attempt to have the downstream standards changed, or stop operating his facility (or abandon plans to construct a new facility or expand an existing facility).

will be violated.[6] No such downstream state standards compliance demonstration is required on the face of the statute or under any prior interpretation of the statute.[7]

The Tenth Circuit's decision also means that a downstream state has the power unilaterally to preclude upstream state industries and municipalities from constructing new discharging facilities, expanding operations at existing facilities, or even continuing to operate existing plants under a newly-issued permit. That is, under the lower court's decision, any state whose water quality may be affected by upstream state sources will be able to adopt a "total elimination of discharges" policy or a strict "non-degradation" rule *applicable at the state line*, or perhaps simply adopt different or more stringent pollutant-specific standards, and thereby preclude discharges (and thus commercial activity) from being permitted in the upstream state. No such direct or indirect downstream state power to regulate or prohibit out-of-state discharges (or

[6] EPA regulations prohibit the issuance of a permit unless all applicable requirements of the Act will be met, including requirements under the water quality laws of the source state. 40 C.F.R. § 122.4. It is the applicant's burden to obtain a source state certification that the relevant source state requirements will be met. *See* 40 C.F.R. Part 121 and 40 C.F.R. § 124.53. It is impossible to predict exactly what kind of downstream state standards compliance demonstration may be required by the Tenth Circuit's decision, what it will cost, or whether it is feasible at all. It is conceivable that the "responsible corporate official" who signs the Ohio permit application would be required to certify, under pain of criminal and civil sanctions, that the proposed discharge complies with all relevant downstream state standards.

[7] The Act presupposes that *EPA*, and not an individual permit applicant, will insure through EPA's state water quality standards-approval process that all states adopt standards which *consistently* meet minimum federal water quality requirements. To the extent any individual state chooses to adopt (and EPA "approves") standards more stringent than the Act requires, such state standards generally cannot be treated as "federal standards." See notes 16 and 17, *infra*, and accompanying text.

interfere with interstate commerce) is authorized by the Act or any prior interpretation of the Act.

Recognizing that conflicts could arise between two or more states regarding the application of differing state water quality standards to shared interstate waterways, the Clean Water Act expressly grants *EPA* the exclusive authority to resolve interstate water quality disputes. That is, when brought to EPA's attention by a downstream state's "objection" or "recommendation" regarding a particular upstream state discharge application, EPA must *consider* (but need not necessarily apply) the water quality standards of the downstream state. The Act thus leaves no room for the Tenth Circuit's contrary inference (much less any room for a contrary finding of "unmistakable" authorization by Congress) that affected state standards apply automatically to out-of-state sources and thus may burden interstate commerce freely at the discretion of the downstream state.

SUMMARY OF ARGUMENT

The Tenth Circuit's unprecedented ruling that the EPA-approved water quality standards of downstream "affected states" must be met by an out-of-state discharge sweeps aside express provisions of the Clean Water Act. Congress expressly provided in § 303(c)(3) of the Act that a federally-approved state water quality standard "shall thereafter be the water quality standard for the applicable waters *of that State*" (emphasis added). Moreover, when a water quality dispute arises between states sharing an interstate waterway, Congress expressly granted EPA exclusive, case-by-case *discretionary* authority to resolve such a dispute, whether the permit is one issued by EPA or the source state. Thus, the Act's express water quality standards dispute resolution provisions, §§ 401(a)(2) and 402(d)(2) of the Act, do not extend the reach of a downstream state's federally-approved water quality standards beyond the waters "of that State." In ruling to the contrary, the

Tenth Circuit ignored this Court's teaching in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ("*Ouellette*"), spelling out the "subordinate" status of a downstream state's water quality standards and finding that any *exceptional* EPA decision to base an upstream state discharge limitation on a downstream state standard is authorized only when EPA determines that the failure to do so would have an "undue impact on interstate waters" in the downstream state.

The Tenth Circuit's second unprecedented ruling, that no new or increased discharge may be permitted into (or upstream from) a waterway not currently meeting applicable water quality standards, is based on an equally flawed reading of the Act. Although stringent conditions are required in permitting new or increased discharges, the statute has never been read to forbid categorically any new or increased discharges to such waters. Even assuming, for example, that a downstream state's "non-degradation" standard were to apply automatically to an out-of-state source (which it does not), the Act nowhere prohibits absolutely any new or increased discharge to a waterway not currently meeting that water quality standard.

ARGUMENT

I. The Act Requires That A Source Comply With Applicable Federal Standards and Source State Standards

A brief statement of the statutory context of the two issues discussed here may be helpful. The succinctly-stated objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a). The means by which the Act's stated objective is to be achieved are set forth in a series of interrelated provisions for federally-established, technology-based effluent limitations and other national standards, for state-established ambient (in-stream) water

quality standards, and for case-by-case permitting of individual proposed discharges.

The establishment of federal technology-based effluent limitations and other national standards—none of which is at issue in this case—is solely within the province of the EPA Administrator. CWA §§ 301, 302, 304, 306, and 307. With respect to state-by-state establishment of in-stream water quality standards, however—such as the Oklahoma "non-degradation" standard at issue here—the Act provides a more complex and flexible scheme.[8]

The Act directs the Governor of each state to adopt in-stream water quality standards for all waters of the United States within each individual state (both intrastate and interstate waters) and to submit such state standards to the EPA Administrator. CWA §§ 303(c)(1) and (2). State standards are to be based, at least in part, on EPA-recommended ambient water quality "criteria" and other scientific information developed and published by the EPA Administrator, and are to reflect state-designated "uses" of particular water bodies within the state (reflecting each state's socio-economic balancing of the needs and desires of its own citizens). CWA § 304. If the Administrator determines that a state standard meets the water quality

[8] Historically, as under the current Act (*e.g.*, §§ 101(b), 303(c), and 402(b)), Congress has recognized the rights and responsibilities of individual states to define their own water quality goals and standards, including appropriate uses of particular waterways. Federal water pollution control legislation which preceded the comprehensive Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), was based entirely on state-established, in-stream water quality standards, which virtually all states adopted and the federal government approved before 1972. *E.g.*, Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965). The federal government's role before 1972 was confined largely to supporting state programs and mediating the application and enforcement of state standards with respect to interstate waters. *See* Zener, "The Federal Law of Water Pollution Control," *Federal Environmental Law* (E.L. Dolgin and T.G.P. Guilbert eds. 1974) 715.

requirements of the Act for the state-designated uses, the state standard thereupon becomes "the water quality standard for the applicable waters of that State."[9] CWA § 303(c)(3). The term "applicable waters of that State" necessarily refers to waters *within* the state. Traditional notions of state sovereignty and federalism, as well as the Commerce Clause of the Constitution of the United States, Art. I, § 8, do not ordinarily allow the extra-territorial application of a state's individual water quality standards to sources located outside that state's jurisdictional boundaries. See pp. 22-25, *infra*.

Federal effluent limitations and other federally-promulgated standards, together with source state water quality standards, provide the foundation for case-by-case permitting of discharges of industrial, municipal, and other effluents to waters of the United States. National discharge permits may be issued by EPA under § 402(a) of the Act, or by the source state in the case in some 39 states which have § 402(b) EPA-approved state NPDES permit programs.

Section 402(a) of the Act authorizes the EPA Administrator to issue NPDES permits under condition that the Act's "applicable requirements" will be met, including any more stringent permitting standards under state law in

[9] If a state-submitted standard is found to be insufficient to meet federal requirements (and, after notice from EPA, the state fails to adopt an appropriate standard), the EPA Administrator may promulgate a *federal* water quality standard for the state. CWA § 303(c)(4). An important factual distinction must be made between "federally-approved" *state* water quality standards—which all states have in great numbers and are required to review at least every three years—and *federal* water quality standards promulgated by EPA, which are exceedingly rare. EPA has long recognized an equally important *legal* distinction between these two forms of water quality standards adopted pursuant to the Clean Water Act. See note 16, *infra*.

accordance with § 301(b)(1)(C).[10] See pp. 14-15, *infra*. Whenever EPA is the permit-issuer, as here, the *source state* also must certify to EPA that the proposed discharge complies with all relevant federally-promulgated effluent limitations and standards, as well as the source state's water quality standards and any other more stringent source state requirements.[11] CWA §§ 401(a)(1) and (d).

If a particular proposed discharge "may affect" the waters of another state, EPA must notify the potentially affected downstream state of the permit application and provide that state an opportunity to "object" and request an EPA hearing.[12] Based upon any "recommendations" of an affected state, EPA's own evaluation, and any additional evidence submitted, EPA is then required to condition the permit "as may be necessary" to insure compliance with "applicable water quality requirements." CWA § 401(a)(2).

The situation thus can arise for a permit issued by EPA under § 402(a), as presented here, wherein EPA determines and a source state certifies that a proposed discharge will comply with all applicable federal and source state requirements, but a downstream state believes its water quality "will be affected" and that its additional or more stringent requirements should be made "applicable" by EPA. In this situation, § 401(a)(2) of the Act imposes upon EPA a duty to *consider* the downstream state's "objection" or "recommendation" and grants EPA the *discretion* to determine what permit conditions are "necessary."[13] Section 401(a)(2) does not define, however, what requirements are "necessary" to protect downstream state water quality, thus leaving for EPA to determine the "applicable water quality requirements" on a case-by-case basis.

[10] Section 402(a)(3) provides that an EPA-issued permit "shall be subject to the same terms, conditions, and requirements as apply to a [§ 402(b)] State permit program and permits issued thereunder . . ."

[11] "The CWA therefore establishes a regulatory 'partnership' between the Federal Government and the source State." *Ouellette*, 479 U.S. at 490.

[12] "While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States)." *Ouellette*, 479 U.S. at 490.

II. The Act Does Not Require That "Affected State" Standards Be Met By An Out-of-State Source

In arguments presented to the court below, EPA and the State of Oklahoma relied heavily on § 301(b)(1)(C) of the Act to discern the meaning of "applicable water quality requirements" pertinent to this case. This provision states that, in order to carry out the Act's objective, there shall be achieved, by July 1977, "any more stringent limitation [than EPA-promulgated effluent limitations] . . . established pursuant to any State law or regulations (under authority preserved by section 1370 [§ 510 of the Act]) . . . or required to implement any applicable water quality standard established pursuant to this [Act]." According to

[13] The Act also clearly grants EPA the *discretion* to protect downstream water quality by requiring additional restrictions when the source state, instead of EPA, is the permit-issuer and the source state must notify other states of potential downstream state impacts. In such a case, pursuant to §§ 402(b)(5) and 402(d)(2), when a downstream state complains that its water quality will be affected, EPA has a duty to evaluate any "recommendation" of the downstream state and the reasons why the source state declined to accept (if such is the case) the downstream state recommendations. The EPA Administrator then may or may not, in his discretion, object to the proposed permit and preclude its issuance by the source state. In *Ouellette*, this Court characterized EPA's discretion in terms of an EPA determination of whether the proposed upstream state discharge would have an "undue impact" on interstate waters. 479 U.S. at 491. Thus, when the source state, instead of EPA, is the permit-issuer—which is how the vast majority of Clean Water Act permits are issued in the 39 states with approved NPDES permit programs—EPA obviously is *not required* to insure compliance with the water quality standards of affected downstream states.

the Tenth Circuit, if *any* state (including, but not necessarily limited to, the source state and any downstream state) has adopted, pursuant to § 510, an effluent limitation more stringent than the appropriate EPA-promulgated effluent limitation, or if *any* state has determined that a more stringent limitation is required to implement a water quality standard which that state has adopted pursuant to § 303(c), then EPA must treat *any* such state's more stringent limitation as an "applicable water quality requirement" under § 401(a)(2). This interpretation of the Act will not withstand scrutiny.

A. Sections 301(b)(1)(C), 303(c), and 510 Do Not Mandate Compliance With "Affected State" Standards

An important statutory construction issue is whether, in the context of a *particular proposed permit*, the Tenth Circuit correctly interpreted the phrases "any State law or regulations" and "any applicable water quality standard" in § 301(b)(1)(C) to refer, literally, to the laws, regulations, and standards of any and all states (source states, downstream states, *and* all other states), or whether they are intended to require compliance only with the more stringent laws or regulations of the kind preserved under § 510 for the *source state* to administer and the *source state's* more stringent water quality standards.[14]

Industry *amici* submit that, when read in the context of a particular permit application, §§ 301(b)(1)(C), 303(c), and 510 have nothing to do with the issue of whether a downstream state's requirements (much less any other state's requirements) must be met. The title of § 301(b)—

[14] If the lower court's literal "any State" interpretation is correct, it could produce the absurd result that a discharge located in New York might be subjected to a more stringent limitation established by the State of California since § 301(b)(1)(C), by its own terms, would not require for such a more stringent state limitation to be "applicable" that it exist in a state which is even "affected" by the proposed discharge.

"Timetable for achievement of objectives"—indicates that this section has to do with the schedule for achieving the Act's various standards and requirements, rather than defining or creating any "applicable water quality requirements" of the Act. Only by reference to §§ 303 and 510 does § 301(b)(1)(C) *incorporate* the right of a state to establish—for application within its own boundaries—certain standards or other requirements which are more stringent than those mandated by the Clean Water Act. Significantly, § 301(b)(1)(C) does *not* incorporate by reference any "requirements" of an affected downstream state under § 401(a)(2) of the Act. Therefore, § 301(b)(1)(C) can only reasonably be interpreted to refer to more stringent requirements of the kind preserved under § 510 for *source state* administration and more stringent § 303(c) *source state* water quality standards (which, it is significant to note, are the *only* state law requirements subject to a § 401 compliance certification).

In sum, there is nothing in §§ 301(b)(1)(C), 303(c), or 510 to suggest that Congress intended these provisions to subject an out-of-state source to the differing or more stringent requirements which a *downstream state* (or any other state) might choose to adopt and apply to its own resident sources. Such an expansive interpretation of §§ 301(b)(1)(C), 303(c), and 510 would nullify the express provisions of the Act which grant EPA *discretionary* authority, under the exceptional circumstance of an interstate water quality dispute, to consider the standards of a downstream state and tailor more stringent permit conditions as "necessary" to protect against an "undue impact" on downstream state water qualilty.[15]

[15] Although the issue is not necessary to a decision in the present case, industry *amici* believe that, in order for EPA to give "federal effect" to a downstream state's water quality standards in the context of resolving an interstate water quality dispute, EPA must comply with procedural requirements akin to those associated with "federal stand-

B. Federal Approval of a § 303(c) "Affected State" Standard Does Not Make It A "Federal Standard"

If downstream state standards are not generally applicable to an out-of-state source under §§ 301(b)(1)(C), 303(c), or 510, the only other way they might be considered generally applicable to an out-of-state source is if they are "federal standards." Not surprisingly, the Tenth Circuit attached special significance to the "federally-approved" water quality standards of an affected downstream state. That is, federal approval of a downstream state standard was considered by the Tenth Circuit to give it greater status than a mere "recommendation" with respect to an out-of-state source. 908 F.2d at 602, n.5, 607, and 608. Indeed, the Tenth Circuit made no distinction at all between federally-*approved state* standards, which must respect state boundaries, and federally-*promulgated* standards, which may apply across state lines.

The Act, however, gives no special status to downstream state "objections" or "recommendations" which are based on a downstream state's "federally-approved" standards. Since the Water Quality Act of 1965 at least, all state water quality standards must meet minimum federal requirements and must be federally approved. In addition,

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ards" *promulgation* under § 303(c)(4), or those required when EPA establishes a water quality related effluent limitation under § 302 of the Act. It is difficult to distinguish, in substance or effect, an EPA decision resolving an interstate water quality dispute from an EPA determination that it is necessary to promulgate "federal standards" for that waterway under § 303(c)(4). Like setting federal standards under § 303(c)(4), EPA's resolution of an interstate water quality dispute results in the designation of certain standards which thereafter will apply *generally* to all present and future discharges to that particular interstate waterway. There is no reason to believe the Act allows EPA simply to *declare*, without more, that certain standards will apply to all present and future discharges to a particular interstate waterway. See note 16, *infra*, regarding a 1977 EPA General Counsel's opinion which suggests that (in 1977, at least) EPA might well have reached this same conclusion.

EPA has seldom if ever failed to "approve" state-submitted standards which are more stringent than those necessary to meet the Clean Water Act's water quality requirements.

If all EPA-approved downstream state standards are "federal standards," and always have been as the Tenth Circuit apparently believes, EPA long ago would have been required to adopt rules and procedures to *insure* that such "federal standards" be met in every case of a potential downstream state impact. That EPA has not done so, in more than 25 years of administering federal water quality legislation, strongly indicates that EPA itself has never considered federally-approved downstream state standards to be "federal standards" or generally applicable requirements with respect to an out-of-state source.[16] Thus, to the extent the Tenth Circuit's grant of mandatory compliance status to affected downstream state standards is tied to their "federally-approved" status, the lower court has given far greater significance to the effect of federal approval than does EPA or the statute itself.[17]

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[16] In 1977, EPA's General Counsel issued a legal opinion directly addressing the question of whether EPA's approval of a state water quality standard creates a "federal standard." The EPA General Counsel, in an opinion which has not since been superseded, ruled that it does *not*, for the following reasons: "[T]he Act in Sec. 303 contains no language suggesting that an approval creates a federal standard. Moreover, in view of the unusual nature of such an action, we do not believe that a statute should be read to provide for establishing Federal regulations by EPA embracing a State regulation through a simple approval, i.e., without following the normal approach of proposing and promulgating regulations independently, unless there is a clear statutory directive or necessity for such an interpretation." Revision of Water Quality Standards and Implementation Plans Under Sec. 303 of the Federal Water Pollution Control Act, Op. EPA General Counsel, No. 58 (March 29, 1977).

[17] By giving automatic "federal effect" or mandatory *out-of-state* compliance status to all EPA-approved § 303 state water quality standards, the lower court would essentially repeal Congress' express directive in

III. The Tenth Circuit's Decision Gives Preeminent Status To "Affected State" Standards, Contrary To This Court's Construction Of The Act In *Ouellette*

The Tenth Circuit's decision makes a virtual mockery of this Court's construction of the Clean Water Act in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In analyzing both of the statutory provisions which grant EPA *discretionary* authority to resolve water quality disputes among states, this Court's unambiguous conclusion was that "affected States occupy a subordinate position to source States in the federal regulatory framework." 479 U.S. at 491. In the case of an EPA-issued permit, as here, this Court clearly recognized EPA's discretionary authority with respect to downstream state standards in stating that an affected downstream state "only has an *advisory role* in regulating pollution that originates beyond its borders." 479 U.S. at 490 (emphasis added). In the case of a permit issued by the source state, instead of EPA, this Court also clearly read the Act as giving EPA the discretion to accept a downstream state's "recommendation" and disapprove the proposed permit *if* EPA determines that the proposed discharge "will have an *undue impact* on interstate waters." 479 U.S. at 490-91 (emphasis added).

The Tenth Circuit's decision, however, gives any downstream state which chooses to adopt water quality standards which are more stringent than the Clean Water Act requires (or which are different from or more stringent than source state requirements) a *preeminent* position in the federal regulatory framework. In doing so, the lower court not only ignores this Court's confirmation of the preeminent status of the *source state's* permit standards

§ 303(c)(3) that EPA-approved state standards generally apply only to the waters "of that State," and would effectively repeal as well Congress' §§ 401(a)(2) and 402(d)(2) grant of *discretionary* authority to EPA to determine that giving effect to a downstream state standard may be "necessary" under the facts of a particular case.

and policy choices,[18] but it also creates an implausible inconsistency in the statute concerning EPA's authority to resolve water quality disputes among neighboring states.

A. Compliance With "Affected State" Standards Cannot Rationally Be Mandatory When EPA Is The Permit-Issuer, But Discretionary When The Source State Is The Permit-Issuer

As interpreted by the Tenth Circuit, § 401(a)(2) absolutely *requires* that the permit insure compliance with affected downstream state standards when EPA is the permit-issuer, as here. When a source state is the permit-issuer, however, EPA's authority under § 402(d)(2) to require compliance with downstream state standards is clearly *discretionary*, as confirmed by this Court in *Ouellette* and acknowledged by the lower court as well (908 F.2d at 611). Thus, under the Tenth Circuit's reasoning, EPA has no alternative but to apply downstream state requirements when EPA issues the permit, but when a source state issues the permit EPA may or may not choose to apply downstream state requirements.[19] It is irrational

[18] "[I]t is not surprising that the Act limits the right to administer the permit system to the EPA and the source States. . . . If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State." *Ouellette*, 479 U.S. at 495.

[19] In recognizing that § 402(d)(2) grants EPA *discretionary* authority to consider imposing additional downstream state requirements when a source state issues the permit—and thus § 402(d)(2) conflicts with the lower court's perception of EPA's *non-discretionary* duty to apply downstream state requirements under § 401(a)(2) when EPA issues the permit—the Tenth Circuit obviously was obliged to explain this apparent inconsistency it found in the statute. The lower court did so by taking the position that § 402(d)(2)—like the court's interpretation of § 401(a)(2)—*requires* EPA, once EPA decides merely to *review* a source-state proposed permit, to insist that the permit comply with the standards of affected downstream states. 908 F.2d at 611, n.19. In contrast to this Court's *Ouellette* discretionary "undue impact" standard for

and thus implausible that Congress intended compliance with downstream state requirements to be compulsory when EPA is the permit-issuer, but discretionary when the source state is the permit-issuer.[20]

Far more plausible and consistent with the statute as a whole, as well as this Court's construction of the Act in *Ouellette*, is an intent of Congress that EPA *always* has discretion to determine whether additional or more stringent conditions are "necessary" to protect the water quality of an affected downstream state. This Court's "undue impact" standard in *Ouellette* unquestionably is an appropriate characterization of EPA's duty to *consider* the application of (but not automatically apply) a downstream state standard "as may be necessary." Among other things, an undue or unacceptable impact test preserves the statutory preeminence of source state requirements, without denying downstream states their statutorily-provided opportunity to convince EPA that compliance with additional

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EPA's review authority under § 402(d)(2), the Tenth Circuit thus interpreted EPA's § 402(d)(2) review authority as being limited to simply confirming whether or not any downstream state requirements would be violated. Thus, if one accepts the Tenth Circuit's reasoning, EPA does not actually have any "undue impact" discretion to exercise under § 402(d)(2) once EPA decides to "review the impact" of the proposed discharge. The only way for EPA to avoid the need to comply with downstream state requirements under § 402(d)(2) would be for EPA to stay completely out of the interstate dispute, and thus defer to the source state.

[20] Source states with EPA-approved permit programs have considerable flexibility regarding the terms and conditions of individual permits, including the acceptance of any recommendations made by a downstream state, but whether or not a downstream state's requirements *must* be met is not within the power of the source state (or the downstream state) to determine. The statute grants that authority exclusively to EPA, to be exercised on a case-by-case basis.

It is significant to recall here as well that § 402(a)(3) of the Act (see note 10, *supra*) requires EPA to apply the *source state's* permit standards whenever EPA is the permit-issuer under § 402(a).

or more stringent downstream state requirements should be found "necessary" in a particular case.

B. As This Court Found In *Ouellette*, The Act's "Savings Clause" Does Not Preserve Rights Under The Law Of An "Affected State"

It is clear from this Court's opinion in *Ouellette*, as well as the Court's earlier pronouncements in *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981), that Congress intended the Clean Water Act to be comprehensive and thus preempt or "dominate the field" of water quality regulation. 479 U.S. at 492. The central issue in *Ouellette* was whether, in light of the Act's generally preemptive federal regulatory scheme—but simultaneous preservation in § 510 of the right of a state to regulate its own waters more stringently, as well as the right of any person to seek enforcement of any state statutory or common law right under § 505(e)—Congress intended to "save" a right to bring suit under the common law of an *affected state*. The Court found that Congress did *not* intend these provisions to save the law of an affected downstream state.[21] In fact, the Court found that the Act's goals and policies, as extensively examined by the Court, indicate that Congress intended just the opposite—to *preempt* an action based on the law of an affected state.[22]

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[21] Of particular importance to the present case, the Court noted in *Ouellette* that § 510's more-stringent-regulation saving clause arguably applies only to "discharges flowing *directly* into a state's own waters, *i.e.*, discharges from within the State." 479 U.S. at 493 (emphasis in original). Moreover, the Court stated that § 505(e) itself does not "purport to preclude preemption of state law by other provisions of the Act." *Id.* Thus, the Act's savings provisions—while preserving certain rights in the *source* state—do not preclude federal preemption of the law of an affected downstream state.

[22] In 1986, the State of Tennessee sought to enforce its state water quality standards and common law remedies against Champion's Canton, North Carolina mill discharge. The Supreme Court of Tennessee ruled—consistent with the Seventh Circuit's opinion in *Illinois v. City*

There is nothing in this Court's analysis of the Clean Water Act in *Ouellette*, or in the Act itself, to suggest that any different conclusion should be reached regarding a downstream state's water quality statutes and regulations. The very same comprehensive federal regulatory scheme—including an express grant of EPA discretionary authority to resolve interstate water quality disputes and to consider downstream state law requirements "as may be necessary"—clearly indicates that Congress did not intend the water quality laws and regulations of downstream states to govern automatically in every case. In other words, Congress' express provision of an exclusive EPA forum to resolve applicable water quality standards disputes for interstate waterways leaves no room for the assertion of any downstream state "rights" with respect to the application of differing or more stringent downstream state law requirements against an out-of-state source.

IV. The Tenth Circuit's Ruling Lacks The Necessary Support Of A Clear And Unmistakable Statutory Authorization For An "Affected State" To Regulate Commerce Occurring Outside Its Borders

The only way the Tenth Circuit's ruling giving preeminent, mandatory compliance status to affected downstream state standards could be legally sustained—as a

of Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984) *cert. denied sub nom., Scott v. City of Hammond*, 469 U.S. 1196 (1985)—that Tennessee could not bring an action to enforce its law against Champion's out-of-state discharge. *State v. Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986). In 1987, this Court granted Tennessee's petition for writ of *certiorari* and remanded the case for further consideration in light of this Court's decision in *Ouellette*. *Tennessee v. Champion Int'l Corp., cert. granted, judgment vacated and remanded*, 479 U.S. 1061 (1987). The Supreme Court of Tennessee subsequently granted a voluntary nonsuit, without prejudice to any claims Tennessee might assert under the Clean Water Act as construed by this Court in *Ouellette*. No subsequent state law enforcement action has been brought by Tennessee regarding Champion's North Carolina discharge.

matter of Commerce Clause law, if not proper statutory construction—would be if, as an element the Act's comprehensive scheme of federal regulation, Congress had *expressly and unmistakably granted* downstream states the power to control out-of-state discharges, and thus interfere with out-of-state commercial activities in the manner which the Tenth Circuit's ruling clearly allows. In short, absent the finding of such an express delegation by Congress, the lower court's decision violates well-established Commerce Clause principles.

State-of-the-art industrial water usage and treatment practices are such that virtually every industrial plant of every size and kind must discharge at least some wastewater effluent after it is treated to meet the requirements of the Clean Water Act. The power to regulate or prohibit industrial discharges, therefore, is the power to regulate or prohibit industrial activity itself.

Oklahoma's adoption of a "non-degradation" standard in the Illinois River *at the Arkansas-Oklahoma state line*, as applied by the Tenth Circuit, represents an assertion of downstream state power to prohibit upstream state discharges. The question here is whether Congress plainly and unmistakably granted downstream states, such as Oklahoma in this case, the power unilaterally to interfere with or prohibit commerce in another state.[23]

Such an express downstream state power to burden interstate commerce cannot reasonably be said to exist on

[23] Congress is free to authorize state-law intrusions upon interstate commerce, but any such delegation of Congress' exclusive authority over interstate commerce must be "expressly stated." *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982). Courts have been hesitant to find that Congress intended to abandon Commerce Clause protections, requiring that such an intent be "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984); *accord Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985) (requiring "plain authorization" by Congress).

the face of the statute, for all the reasons previously discussed. It is evident from the lower court's own extensive and somewhat strained analysis of the Act that the Tenth Circuit also could not find in the statute any *plain* or *unmistakable* delegation of such power to downstream states.[24] Nor is it sufficient for a court to infer such power from the statutory purposes or the legislative debates.[25]

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[24] If such an affected downstream state power had been intended, Congress might easily have written expressly into the statute that which the Tenth Circuit was able to find only by inference. In § 301(b)(1)(C), for example, Congress easily could have incorporated by reference "any applicable requirements pursuant to § 401(a)(2)" to make it clear that any different or more stringent requirements of affected downstream states must be achieved. Congress also could have provided in § 401(a)(2) that, where the proposed discharge affects downstream state waters, no permit may be issued unless the affected state *certifies* (like the source state must) that its applicable water quality requirements will be met. Congress did not include in the statute any such provisions, but instead granted EPA express discretion to consider impacts on downstream state waters as they might arise in a particular case.

[25] The Tenth Circuit's decision would raise Commerce Clause issues even if Congress had not clearly intended the Clean Water Act to preempt the field of water quality regulation, and had not expressly provided an exclusive EPA forum for resolving interstate water quality disputes. The "dormant" Commerce Clause limits state action just as surely as express federal preemption. *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534-35 (1949). In such a case, the propriety of state action under the Commerce Clause must be assessed by balancing the local benefits to the regulating state against the burdens placed on interstate commerce. State action which is facially discriminatory against out-of-state businesses is subject to particular scrutiny. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (states bear the burden of demonstrating that no less discriminatory alternatives exist). Even state action which is "even-handed," however, must be examined closely in a dormant Commerce Clause situation to determine whether "the burden imposed on such [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). No such benefits-burdens evaluation was undertaken by the Tenth Circuit here, further indicating that the lower court ignored the Commerce Clause implications of its decision, as well as the broad federal preemption basis of this Court's decision in *Ouellette*.

When Congress has spoken clearly and unmistakably to the contrary by providing an exclusive, case-by-case, EPA forum for resolving interstate water quality disputes, no court should be allowed to grant a downstream state the power to interfere unilaterally with permitting decisions in the source state.

EPA's role in issuing permits for discharges to interstate waterways, and EPA's role in resolving water quality disputes concerning discharges to interstate waterways, was not intended by Congress to be reduced to a mechanical process of simply applying, whenever they are different or more stringent, the EPA-approved standards of affected downstream states. There is thus no basis for the lower court's conclusion that downstream state standards occupy a position of preeminence (or even occupy an equivalent status with source state standards) in the federal regulatory framework.

V. The Tenth Circuit's Absolute Prohibition Of New Discharges To Waters Not Meeting Water Quality Standards Lacks A Proper Statutory Basis

Compounding the error of giving preeminent, mandatory compliance status to affected downstream state standards, the Tenth Circuit also misread the Act as absolutely prohibiting any new or increased discharges to a waterway which is not currently meeting the downstream state's (or the source state's) water quality standards.

While it is true that a stated "goal" of the Act is the elimination of discharges of pollutants, it is equally undeniable that the specific substantive provisions of the Act do not require such elimination and that the Act allows each state to decide for itself how far and how fast it will move towards achieving that goal. The Act has never been interpreted by EPA, or by any court heretofore, to require an absolute ban on new or increased discharges in order to achieve the Act's goals, whether at the behest of a downstream state or not.

In support of its conclusion that such a prohibition exists in the Act, the Tenth Circuit relied almost exclusively upon its "common sense" understanding of the Act's goals and purposes and the "absurdity" of a policy that would allow a new discharge—including one whose individual impact is undetectable—to be made into a waterway which is not currently meeting applicable water quality standards. 908 F.2d at 631-32. The absence of "an *explicit* imprimatur" in the statute (908 F.2d at 632, emphasis in original) for the court's *absolutist* ruling, however, obviously cannot be overlooked.

The "national goal" of eliminating the discharge of pollutants into navigable waters by 1985, upon which the lower court placed so much emphasis (908 F.2d at 630-32), has not been achieved by 1991 and by many accounts may not ever be achieved. Nor should undue weight be given to the equally slippery notion, adopted by the Tenth Circuit, that EPA's "watchful role" and other responsibilities as custodian of the navigable waters is sufficient to "subsume the power [or duty] to prohibit any new discharge of pollution, regardless of the magnitude of its impact, where the existing quality of the receiving waters does not meet required standards."[26]

It is illogical to conclude that EPA's powers or duties under the Act are unlimited when it comes to regulating or prohibiting new discharges, but are severely restricted when it comes to determining the applicable standards for discharges to interstate waterways. Industry *amici* submit that, based on the discretionary federal balancing process set out in the interstate dispute resolution provisions of the Act (as well as the Commerce Clause balancing test,

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[26] 908 F.2d at 634. More than a matter of proper statutory construction, as discussed previously the Commerce Clause also does not allow the out-of-state application of a broadly prohibitive "non-degradation" or similar *downstream state* water quality standard without express authorization by Congress.

if express federal preemption is found not to exist), the Tenth Circuit got it exactly backwards. The statute explicitly grants EPA discretion to determine the "applicable water quality requirements" for discharges to interstate waterways when a dispute arises among neighboring states, whether EPA itself or the source state is the permit-issuer. The statute imposes no strict duty and confers no broad authority upon EPA (and certainly not upon a downstream state) to ban all new or increased discharges to waterways not currently meeting water quality standards.

Indeed, the breadth of EPA's duties and the scope of EPA's authority in both of these respects cannot be more aptly described than by asking, in the words of this Court in *Ouellette*: Does the proposed discharge, in EPA's judgment, have an "undue impact" or unacceptable effect on the waters in question? Requiring EPA to apply automatically the additional or more stringent standards adopted by an affected downstream state (or stay completely out of the interstate dispute, and thus defer to the source state), and requiring EPA to ban absolutely any new discharge to a waterway not currently meeting the applicable standards, robs EPA of the federal balancing role which Congress expressly granted EPA under the Act, as recognized by this Court in *Ouellette*.[27]

CONCLUSION

The Tenth Circuit's grant of automatic, mandatory compliance status to the federally-approved state water quality standards of affected downstream states—giving them preeminent status over federally-approved source state standards—is contrary to the Clean Water Act, this Court's broad federal preemption construction of the Act in *Ouellette*, and Commerce Clause principles as well.

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[27] Judicial review of EPA's exercise of that discretion, based upon a proper record of EPA's decision, is available to protect aggrieved parties against possible abuse.

The lower court's absolute ban on new discharges to waterways not currently meeting applicable water quality standards is without any proper statutory basis.

For the foregoing reasons, *amici curiae* Champion International Corporation, American Paper Institute, National Forest Products Association, American Iron and Steel Institute, American Mining Congress, The Fertilizer Institute, Chemical Manufacturers Association, National Association of Manufacturers, Associated Industries of Arkansas, Arkansas Federation of Air and Water Users, Inc., and Arkansas Poultry Federation respectfully urge the Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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May 31, 1991

(14) (13)

Nos. 90-1262, 90-1266

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,
v.
STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,
v.
STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, THE MUNICIPAL LEAGUES REPRESENTING OVER 9000 CITIES IN TWENTY-SIX STATES, AND FIVE INDIVIDUAL CITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-1262, 90-1266

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES, THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, THE MUNICIPAL LEAGUES REPRESENTING OVER 9000 CITIES IN TWENTY-SIX STATES, AND FIVE INDIVIDUAL CITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The Association of Metropolitan Sewerage Agencies, the National Institute of Municipal Law Officers, the Southeastern Colorado Water Conservancy District, the municipal leagues representing more than 9,000 cities in twenty-six states, and five individual cities submit this

brief as amici curiae in support of the petitioners and urge this Court to reverse the decision by the U.S. Court of Appeals for the Tenth Circuit in *Oklahoma* v. *EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

INTEREST OF THE AMICI CURIAE

The amici associations and cities strongly urge this Court to reverse the decision below because the Tenth Circuit's misinterpretation of the Clean Water Act will have a devastating impact on cities and municipal treatment facilities throughout the country.

The amici associations represent cities and municipal sewerage authorities located all across the nation. In particular, the Association of Metropolitan Sewerage Agencies is a national non-profit association of 116 municipal sewerage agencies and special purpose sewerage districts. Its member agencies are responsible for managing nearly all of the nation's large publicly owned treatment works, serving a combined population of over eighty million people.

The National Institute of Municipal Law Officers is an association of municipal attorneys who represent approximately 1400 cities, counties, and special municipal districts in the United States. It is organized and operated for educational and local government related purposes. The Southeastern Colorado Water Conservancy District is a quasi-municipal governmental district established under the Colorado Water Conservancy Act. The District is a governmental entity that exercises taxing powers to provide funding for water diversion projects which supply water to many Colorado municipalities.

The twenty-six state municipal leagues joining this brief are voluntary associations of municipalities organized to serve municipal governments and represent their interests before the legislative, executive and judicial branches of the state and federal governments. Together, the amici state leagues represent more than 9000 municipalities and cities. Specifically, the leagues joining this brief are:

[1] The petitioners and respondents in both cases have consented to the filing of this brief. The letters granting their consent have been filed with the Clerk of the Court.

Arkansas Municipal League	479 municipal members
Colorado Municipal League	248 municipal members
Georgia Municipal Association	400+ municipal members
Association of Idaho Cities	181 municipal members
Illinois Municipal League	982 municipal members
League of Kansas Municipalities	527 municipal members
Louisiana Municipal Association *	269 municipal members
Michigan Municipal League	504 municipal members
League of Minnesota Cities	801 municipal members
Montana League of Cities and Towns	128 municipal members
League of Nebraska Municipalities	375 municipal members
Nevada League of Cities	18 municipal members
New Hampshire Municipal Association	232 municipal members
New Jersey State League of Municipalities	560 municipal members
New Mexico Municipal League	99 municipal members
Association of Towns of the State of New York	890 municipal members
North Carolina League of Municipalities	496 municipal members

* The Louisiana Municipal Association prefers not to take a position on the first issue at this time and therefore only joins Part II of this brief.

North Dakota League of Cities	341 municipal members
Ohio Municipal League	640 municipal members
League of Oregon Cities	238 municipal members
Pennsylvania Municipal League	250 municipal members
Municipal Association of South Carolina	257 municipal members
South Dakota Municipal League	314 municipal members
Tennessee Municipal League	321 municipal members
West Virginia Municipal League	232 municipal members
Wyoming Association of Municipalities	97 municipal members

The five individual municipalities joining this biref range from a large city in a major metropolitan area to three small towns in northwestern Arkansas.[2] These individual municipalities, like most of the thousands of municipalities represented by the state amici municipal leagues, operate municipal waste water treatment plants that must discharge treated effluent into interstate waterways, in compliance with the Clean Water Act.

Municipalities will directly bear the brunt of the Tenth Circuit's decision because they build and operate wastewater treatment plants. Just as every city needs a source of water, so too must every city provide

[2] Most municipalities have joined this brief through their state municipal leagues. However, a few municipalities also joined in their individual capacities because of special circumstances. The Arkansas municipalities of Siloam Springs, Rogers and Springdale all discharge into the same river that is involved in the present case, and the Tenth Circuit's decision is being, or will soon be, applied directly to block the permit renewals of these cities' municipal treatment plants. Minneapolis is at the head of the Mississippi River, and therefore, the Tenth Circuit's decision will potentially require that city's treatment plant to comply with the water quality standards of as many as nine or ten downstream states.

a system for collecting, treating, and removing the wastewater generated by its residents. In order to discharge the treated effluent, municipal treatment plants must apply for and obtain a discharge permit under the National Pollutant Discharge Elimination System ("NPDES") of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1988). Over 16,000 municipal treatment plants are currently operating with approved NPDES permits. In addition, a large number of new and upgraded facilities will be needed by the end of this century to meet the goals of the CWA. Total expenditures on new and upgraded municipal treatment plants are expected to exceed $100 billion by the year 2000.

The Tenth Circuit's decision will make it significantly more difficult for municipal treatment plants to receive new or renewed discharge permits under the CWA, because the court imposed two new and very stringent conditions for permit approval. First, the court construed the CWA as requiring point sources to strictly comply with the water quality standards of downstream states, in addition to the standards of the source state. Permitting agencies were afforded no flexibility to interpret or deviate from downstream state standards. Second, the court held that no new permit can be issued to a facility which is upstream from an existing violation of a relevant water quality standard, even if the facility's discharge would have no detectable impact on water quality. In many cases, the Tenth Circuit's decision may prevent the issuance of NPDES permits for municipal treatment plants constructed to comply with the CWA.

The increased difficulty in obtaining permits for municipal treatment plants will place extraordinary burdens on cities and municipalities throughout the nation. Already these cities are struggling under the weight of mounting fiscal difficulties. In attempting to ascertain and comply with the standards chosen by downstream states, cities would be required to expend more of their increasingly

scarce resources, even as federal grants for the construction of wastewater treatment plants are being cut.

For these reasons, the amici parties representing cities and municipal treatment facilities that are almost certain to be harmed by the Tenth Circuit's decision have a substantial and direct stake in the present case and respectfully urge this Court to reverse the decision of the Tenth Circuit.

SUMMARY OF THE ARGUMENT

The Tenth Circuit's first holding regarding the interstate application of water quality standards will disrupt the balanced approach and mechanism Congress created in the CWA to resolve interstate water quality disputes. The statutory provisions enacted by Congress recognize the legitimate environmental and economic interests of both upstream and downstream states. Under the CWA, EPA is assigned the role of final arbitrator to balance the competing interests of upstream and downstream states. EPA can block a permit if the upstream state discharge would have an undue impact on water quality in the downstream state. The Tenth Circuit's decision completely changes the rules for resolving interstate water quality disputes under the CWA, by giving a downstream state absolute power to impose its water quality standards on upstream states with no mechanism or mediator to prevent unreasonable or unjust results.

The Tenth Circuit's second holding, imposing a permit ban upstream from existing water quality violations has no explicit basis in the CWA, will cause widespread economic and environmental harm, and threatens to disrupt one of the principal goals of the CWA—the construction of publicly owned wastewater treatment plants. Moreover, the court's holding is directly inconsistent with section 303(d) of the CWA, which grants states with existing water quality violations broad discretion to implement wasteload allocation plans designed to gradually bring affected water segments into compliance. This provision, which would allow new discharges or increased discharges from existing sources consistent with an approved wasteload allocation plan, cannot be reconciled with the Tenth Circuit's approach of banning all new discharges, irrespective of their impact on water quality.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION DISRUPTS THE DELICATE BALANCE BETWEEN THE INTERESTS OF UPSTREAM AND DOWNSTREAM STATES ESTABLISHED BY THE CLEAN WATER ACT AND CREATES AN UNJUST AND UNWORKABLE REGULATORY SCHEME.

The Tenth Circuit's decision completely changes the rules for resolving interstate water quality disputes under the CWA. It gives a downstream state absolute power to impose its water quality standards on upstream states, with no mechanism or mediator to prevent unreasonable or unjust results. This decision will disrupt the careful balance of upstream and downstream state interests established by Congress in the CWA, undermine the federal role as mediator of interstate water quality disputes, and adversely affect thousands of municipalities across the country.

A. The Clean Water Act Establishes A Reasonable Balance Between The Legitimate Interests Of Both Upstream And Downstream States.

The statutory scheme created by Congress in the CWA makes permitting agencies responsible for mediating interstate water quality disputes, subject to EPA oversight. By requiring point sources to comply strictly with the water quality standards of downstream states, the court of appeals ignored this statutory scheme, ostensibly to protect downstream states. Moreover, the court's interpretation conflicts with the measures Congress purposely enacted to provide such protection and to assure

a fair and reasonable balance between the interests of upstream and downstream states.

In particular, Congress included at least three alternative safeguards in the CWA to protect downstream states from upstream discharges. First, Congress deliberately structured the CWA to prevent the establishment of upstream "pollution havens" by requiring states to comply with minimum federal requirements.[3] State water quality standards must be approved by EPA to ensure that they meet or exceed the federal criteria. CWA § 303(a), 33 U.S.C. § 1313(a).[4] This requirement prevents an upstream state from adopting inadequate water quality standards which would leave the waters of a downstream state potentially vulnerable.

Second, the CWA provides a consultative mechanism whereby a downstream state can express its concerns about upstream discharges to the permitting authority for the source state. CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5); CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2). The permitting agency must consider the downstream state's recommendations and determine whether additional limitations are necessary to protect downstream water quality. While these provisions do not give a downstream state veto power over permit decisions in an upstream state, *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490 (1987), they do afford the downstream

[3] *See* S. Rep. No. 370, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 4 Senate Comm. on Environment and Public Works, Legislative History of the Clean Water Act of 1977, at 633, 706 (1978).

[4] If a state's water quality standards are not consistent with EPA's criteria or otherwise defensible, and the state does not make the needed changes in a timely manner, EPA is required by the CWA to promulgate adequate standards. CWA § 303(a), 33 U.S.C. § 1313(a). In addition, section 510, 33 U.S.C. § 1370, allows states to adopt stricter water quality standards that exceed the federal criteria, but these more stringent standards can only be applied against in-state dischargers. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 328 (1981) (*Milwaukee II*).

state the right to be consulted and to have the permitting agency consider its views.

Finally, the CWA authorizes EPA to veto any state-issued permit that fails to protect adequately the water quality of a downstream state. If a state permitting agency declines to adopt the written recommendations of a downstream state to ameliorate the interstate effects of a proposed permit, EPA is given discretion to veto the state-issued permit. CWA § 402(d)(2)(A), 33 U.S.C. § 1342(d)(2)(A).[5] Thus, EPA is assigned the role of arbitrator under the CWA to balance the competing interests of upstream and downstream states, and to block a permit issued by the upstream state that would have an undue impact on water quality in the downstream state.

The Tenth Circuit failed to recognize these alternative mechanisms that Congress specifically adopted in the CWA for protecting the waters of downstream states. Instead, the court created a new, one-sided approach that allows a downstream state to unilaterally impose its standards on upstream sources. Unless overturned by the Court, this decision would effectively empower downstream states to veto permits for upstream facilities, and would disrupt the carefully crafted balance between the interests of upstream and downstream states established by Congress in the CWA.

B. Congress And This Court Have Both Recognized The Need For A Federal Mediator To Resolve Interstate Water Disputes.

The fair and efficient resolution of interstate water quality disputes will often require a mediator, and in enacting the CWA Congress assigned that responsibility to EPA. Interstate water quality disputes arise because

[5] EPA's decision whether to veto the permit is discretionary, and federal courts have held that a decision not to veto the permit is unreviewable. *District of Columbia* v. *Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980).

of the inherent tension between the geographical fact that U.S. waterways are predominantly interstate and the political reality that water quality policies vary among states. The many important differences in economic, industrial, social, political, and geographic conditions among states inevitably result in different priorities for state waters. When neighboring states set different priorities for adjoining segments of the same waterway, full-scale state-versus-state disputes can erupt in which the legitimate interests of both downstream and upstream states are threatened.

A federal mediator is needed to resolve these interstate water disputes so that states may not unjustly or unreasonably impose their policy choices on adjoining states. This mediation role can be filled either by a federal agency or the federal courts. Traditionally, the federal courts have arbitrated interstate disputes over water quality and water rights.[6] In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (hereinafter *Milwaukee I*), this Court confirmed that in resolving interstate water pollution disputes the federal courts should apply federal, not state, law. *Id.* at 102.[7] *Accord Hinderlider* v. *La Plata*

[6] *See, e.g., Colorado* v. *New Mexico*, 459 U.S. 176 (1982) (water rights); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945) (water rights); *Colorado* v. *Kansas*, 320 U.S. 383 (1943) (water rights); *New York* v. *New Jersey*, 256 U.S. 296 (1921) (water quality); *Kansas* v. *Colorado*, 206 U.S. 46 (1907) (water rights); *Missouri* v. *Illinois*, 200 U.S. 496 (1906) (water quality).

[7] Although the specific holding of *Milwaukee I* that courts should apply federal common law to resolve interstate water quality disputes was overtaken by Congress' comprehensive 1972 amendments to the CWA, *see infra*, this Court continues to cite *Milwaukee I* for the proposition that state law is inapplicable to interstate disputes implicating conflicting state interests and that federal law must govern. For example, in *Texas Indus., Inc.* v. *Radcliffe Materials, Inc.*, 451 U.S. 630 (1981), this Court relied upon *Milwaukee I* for its conclusion that federal law should control interstate and international controversies. "In these instances, our federal system does not permit the controversy to be resolved under state law . . . because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Id.* at 641.

Co., 304 U.S. 92, 110 (1937) (rights in interstate streams "have been recognized as presenting federal questions").

In the 1972 CWA amendments, Congress shifted the responsibility for mediating interstate disputes from the federal courts to EPA. Prior to the enactment of these amendments, the CWA was not sufficiently comprehensive to resolve the interstate water disputes that were likely to arise. *Milwaukee I*, 406 U.S. at 107. This Court therefore held that disputes would be resolved in accordance with federal common law, as interpreted and applied by the federal courts. *Id.* at 107-08. In revisiting the ongoing litigation between Illinois and Milwaukee after the enactment of the comprehensive 1972 amendments to the CWA, this Court held that the new NPDES scheme created by Congress preempted federal common law and that the amended Act now entrusted federal oversight of water quality standards and resolution of interstate water quality disputes to EPA as the expert administrative agency. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*).

In implementing its role as a federal mediator under the CWA, EPA has adopted a case-by-case approach to mediate such disputes, pursuant to the Congressional mandate described above. Accordingly, when promulgating its final regulations governing the development of state water quality standards, EPA declined to adopt specific rigid procedures for mediating interstate disputes, explaining that it would mediate any conflicts engendered by incompatible state standards on a case-by-case basis after considering all of the relevant circumstances. EPA, Water Quality Standards Regulations, 48 Fed. Reg. 51,400, 51,413 (1983).

The case-by-case approach adopted by EPA is consistent with the Court's recognition in *Milwaukee I* that

"[t]here are no fixed rules that govern," and that all the equities and facts peculiar to the particular case must be considered when deciding water quality disputes. 406 U.S. at 106-08. Similarly, when resolving water rights issues, the Court has stressed the need for "expert administration rather than judicial imposition of a hard and fast rule" because of the complicated and delicate questions presented when adjudicating the relative rights of states. *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943). It was in light of these considerations that EPA elected in its water quality standards regulations to continue the case-by-case approach recognized as necessary by this Court.

The Tenth Circuit's decision, by contrast, "usurp[s] EPA's role under the Act as the arbiter of interstate water pollution disputes." EPA Pet. at 12-13. If the decision is upheld, EPA will lose its authority to prevent unreasonable results or to craft compromises that would adequately protect all affected interests. There will no longer be a means for achieving a final and equitable resolution of conflicts between states, leaving municipalities and other permit applicants caught in the middle of intractable interstate water quality disputes.

C. The Decision Below Will Produce Unfair And Counterproductive Consequences By Impeding Permit Approvals For Municipal Wastewater Treatment Plants Across The Country.

Municipalities, and special purpose districts created by state legislatures to provide wastewater treatment services, will suffer the most severe consequences of the Tenth Circuit's holding. Prior to the Tenth Circuit's decision, downstream states had an advisory, but not a controlling, role in upstream permitting decisions. Thus, downstream states were compelled to negotiate and compromise with upstream states to reach mutually acceptable resolutions of potential water quality disputes. Under the Tenth Circuit's decision, however, downstream states will have the

unilateral right to block new and renewed upstream permits whenever they choose by imposing exceptionally stringent standards. Placing such absolute power over upstream states in the hands of downstream states not only usurps EPA's statutory power to mediate interstate disputes, but also eliminates any incentive for downstream states to reach negotiated solutions. The inevitable result will be a dramatic increase in contested permit proceedings and state-versus-state litigation. Any prolongation or complication of the permitting process will harm virtually every municipality nationwide. Increased costs will necessarily result, imposing substantial additional economic burdens on municipalities and their residents.

The Tenth Circuit's holding also will result in burdensome new conditions in the NPDES permits of many municipal wastewater treatment plants. In the past, such facilities have been designed and built to ensure compliance with the water quality standards of the source state. Under the Tenth Circuit's decision, many municipalities will now be forced to undertake costly modifications and retrofitting of existing facilities to meet downstream standards even though such changes may be unnecessary and result in no benefit to the environment or to water quality.

The burden imposed on municipalities by the Tenth Circuit's holding is compounded by the fact that downstream states can choose to implement more stringent standards at any time. Thus, even those facilities that do manage initially to achieve compliance with all federal, source state, and existing downstream state standards may in the future be forced to implement even more onerous control measures if a downstream state decides later to adopt more stringent standards.[8] Municipalities

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[8] NPDES permits are issued for a maximum of five years and EPA's regulations require permit renewals to incorporate new condi-

will face long-term uncertainties regarding the future costs and requirements for operating their wastewater treatment plants.

The impact of the Tenth Circuit's decision will be especially severe today, with so many municipalities facing steadily mounting financial crises. Resources for water pollution control are becoming increasingly scarce as the federal construction grant program is phased out. If municipalities are forced to expend substantial resources to modify or retrofit their treatment plants as a result of the Tenth Circuit's decision, the current financial problems facing our cities will be compounded dramatically. Some municipalities may be denied permits altogether by the court's new rule, and therefore barred from legally discharging their effluent. Such municipalities would be put in the impossible position of being forced to shut down their wastewater treatment facilities, jeopardizing the ability to provide sewage and other water treatment services for their residents. Municipalities, unlike many industries and other sources requiring permits, simply do not have the option of avoiding such a shutdown by moving to another location.

Given these potentially dire consequences, there must be safeguards to prevent the imposition of unreasonable requirements on sources in upstream States. The statutory scheme enacted by Congress provides such a mechanism, since it requires permitting agencies to consider and balance all affected interests. In contrast, the Tenth Circuit's holding will allow downstream states to impose their standards on upstream sources without any consideration whatsoever of the harm to upstream communities.

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tions necessary to ensure compliance with any intervening changes in applicable water quality standards. 40 C.F.R. § 122.43(b)(1). Under the Tenth Circuit's holding, a municipal treatment plant that discharges into an interstate waterway will therefore be constantly vulnerable to changes in a downstream state's standards, which may require major new expenditures and modifications by the plant.

Heretofore, the promulgation of water quality standards has always involved the balancing of economic and environmental considerations so as to improve water quality without causing undue economic and social hardship. *See, e.g.*, EPA, Water Quality Standards Regulations, 48 Fed. Reg. 51,400 (1983). From the outset, Congress indicated that water quality regulations "must relate the economic and social benefits to be gained with the economic and social costs to be incurred."[9] EPA accordingly has directed states to consider the economic impact on municipalities when setting or revising water quality standards:

> States should consider the economic effects associated with controls beyond the technology-based requirements in Section 301(b)(1)(B) of the Clean Water Act. If water quality standards require municipal treatment beyond those levels, EPA believes States should evaluate both the municipality's ability to make the initial pollution control investment and their financial capability over time for continued operation and maintenance. States should also evaluate changes to disposable income resulting from increased user charges or higher taxes. Another effect to consider is a situation where the municipality can make the investment for pollution control only by restricting expenditures for other municipal activities.[10]

Since a state has a strong stake in the ability of in-state sources such as municipal treatment facilities to serve and support its residents, a state agency has an incentive not to set water quality standards that are impossible or economically infeasible for such sources. However, a downstream state has no such incentive to consider the feasibility of its standard for upstream sources,

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[9] 117 Cong. Rec. 38,805 (Nov. 2, 1971) (statement of Sen. Randolph), *reprinted in* 2 Senate Comm. on Public Works, 93rd Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 1272 (1973).

[10] EPA, *Water Quality Standards Handbook* 2-11 (Dec. 1983).

because there is no commonality of social and economic interests. Thus, under the Tenth Circuit's decision, states will have no obligation to weigh the harmful impact of their standards on all affected parties as contemplated by Congress and EPA. *See International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987).

For example, EPA's regulations now permit states to revise their water quality standards if attainment is not feasible because the standards "would result in substantial and widespread economic and social impact." 40 C.F.R. § 131.10(g)(6). There is no reason to expect that a downstream state will give adequate consideration to the economic or environmental impact of its water quality standards on an upstream state. Nor is a downstream state likely to make accommodations when setting its standards, even though a source state agency would find those accommodations appropriate. Furthermore, a state can grant variances from its own water quality standards to individual facilities that cannot meet a standard.[11] Again, however, a downstream state has very little incentive to consider the circumstances of an out-of-state facility and grant a variance when appropriate.

For all of these reasons, the Tenth Circuit's holding leaves municipalities and other sources discharging into interstate waterways completely at the mercy of downstream states. There is nothing to guarantee meaningful consideration of the potentially devastating impact that a downstream state's chosen water quality standards may have on upstream sources, nor will EPA be allowed to prevent the unreasonable consequences that may result from the extra-territorial application of downstream standards. The amici cities and associations submit that Congress never intended the outcome ordained by the Tenth Circuit, which would inevitably lead to unjust and unreasonable consequences for upstream facilities.

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[11] *See* EPA, Water Quality Standards Regulations, 48 Fed. Reg. 51,400, 51,403 (1983).

II. THE TENTH CIRCUIT'S IMPOSITION OF A PERMIT BAN UPSTREAM FROM EXISTING WATER QUALITY VIOLATIONS LACKS ANY BASIS IN THE CLEAN WATER ACT AND WILL INEVITABLY IMPAIR EFFORTS TO IMPROVE WATER QUALITY.

In construing the CWA to ban new permits upstream from existing water quality violations, the Tenth Circuit conceded that its holding lacks an "explicit imprimatur" in the CWA. 908 F.2d at 633. The court nevertheless concluded that "common sense" required a ban on new permits to meet the goals of the CWA.[12] In fact, the CWA envisions a more equitable and less disruptive approach for restoring degraded waterways. States with water quality violations are required to allocate among all existing and new dischargers the total maximum daily load that a particular waterway can accept without exceeding standards. CWA § 303(d), 33 U.S.C. § 1313(d). These maximum daily load allocations are to be completed in phases, based on the priority ranking the state assigns to each waterway within its borders. *Id.* These provisions of section 303(d), which would allow new discharges consistent with an approved wasteload allocation plan, cannot be reconciled with the Tenth Circuit's ban on all new discharges, irrespective of their impact on water quality.[13]

If allowed to stand, the Tenth Circuit's decision would disrupt one of the principal goals of the CWA—the construction of publicly-owned wastewater treatment plants. CWA § 101(a)(4), 33 U.S.C. § 1251(a)(4). To achieve

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[12] 908 F.2d at 631 ("Common sense dictates that a pollution control strategy designed to prevent, abate, and eliminate pollution would be subverted by allowing a new source of pollution on a currently polluted water course.").

[13] The Tenth Circuit's holding would also prohibit a new discharge that will have no detectable impact on water quality, and therefore would not contribute to an existing violation. There is no basis for such an extreme result in the language or legislative history of the CWA.

the CWA's goals of improving water quality, EPA has estimated that over 6000 new plants will have to be built at a cost of some $108 billion by the year 2000.[14] The decision below would prevent many of these plants from obtaining NPDES permits because a significant proportion of the nation's waterways have existing violations of water quality standards. According to EPA's most recent *National Water Quality Inventory*, thirty percent of the river and stream miles that have been assessed nationwide do not fully comply with applicable water quality standards.[15] The Tenth Circuit's decision would effectively block any new discharge permit for a plant that is upstream from a river segment with an existing water quality violation.

The lower court's supposed "solution" is thus counterproductive to the central aims of the Act. Prohibiting permits for new municipal wastewater treatment plants frustrates, not promotes, the improvement of water quality. A recent EPA study found that the construction or upgrading of municipal treatment plants substantially improved downstream water quality in almost every case.[16] The pending case is illustrative. The Tenth Circuit would block the permit for a new $40 million state-of-the-art municipal treatment plant which discharges much cleaner effluent than the older facility it was built to replace. If applied nationwide, this decision will prevent the permitting and operation of many new plants currently under construction, and create a strong disincentive for municipalities to construct new or upgraded facilities.[16]

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[14] *Amending the Clean Water Act: Hearings on S. 53 and S. 652 before the Subcomm. on Environmental Pollution of the Senate Environment and Public Works Comm.*, 99th Cong., 1st Sess. 309 (1985).

[15] EPA, *National Water Quality Inventory, 1988 Report to Congress* 1-3 (EPA 440-4-90-003, Apr. 1990).

[16] EPA, *Before-and-After Case Studies: Comparisons of Water Quality Following Municipal Treatment Plant Improvements* (EPA-430/9-007, May 1984).

In addition to blocking new upstream plants from obtaining permits, the decision below will halt the operation of many existing treatment plants that may be required to obtain new permits. For example, in accordance with the 1987 amendments to the Clean Water Act, EPA recently enacted regulations requiring certain municipalities and industrial facilities to obtain new permits for storm water discharges. CWA § 402(p), 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26. EPA has estimated that at least 173 cities and 47 counties, as well as over 100,000 industrial plants, will be required to obtain storm water discharge permits. EPA, NPDES Application Regulations for Stormwater Discharges, 55 Fed. Reg. 47,989, 48,073-74 (1990). If the Tenth Circuit's decision were allowed to stand, these facilities will not be able to obtain the required permits if they happen to be upstream from an existing water quality violation and their storm water contains even trace quantities of a relevant pollutant.

Many municipalities may thus suddenly be forced to shut down their treatment plants, leaving no legal means of collecting and removing wastewater. Such facilities provide an essential service to millions of households, businesses, and government buildings across the country and are an integral part of the federal program for improving water quality. Congress never intended the extreme rule adopted by the Tenth Circuit, which will result in blocking the construction or operation of many of these essential wastewater treatment plants.

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[17] Since the Tenth Circuit's permit ban holding only blocks permits for new discharges, it will not apply to existing facilities that may be equipped with inadequate and outdated pollution control technologies. Consequently, court's holding will have the perverse effect of blocking the replacement of such facilities with new, modern facilities that will substantially reduce pollution discharges.

By affording states the flexibility and time to bring degraded waterways into compliance with water quality standards, Congress manifestly intended to prevent the severe economic and social disruption that the Tenth Circuit's permit ban requirement will cause. Unless overturned, the court of appeals' decision will also undermine the CWA's very goal of improving water quality by blocking the approval of permits for municipal wastewater treatment plants.

CONCLUSION

For the foregoing reasons, the Supreme Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

(15) (14)

Nos. 90-1262, 90-1266

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

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Petitioners,
v.
STATE OF OKLAHOMA, et al.,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY
Petitioner,
v.
STATE OF OKLAHOMA, et al.,
Respondents.

BRIEF OF THE STATE OF COLORADO AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE STATE OF COLORADO AS AMICUS CURIAE IN SUPPORT OF PETITIONERS
On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

The State of Colorado respectfully submits this brief as amicus curiae in support of petitioners and urges this Court to reverse the decision by the United States Court of Appeals for the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

[1] This *amicus* brief is submitted by the Colorado Attorney General on behalf of the State. Pursuant to Supreme Court Rule 37.5, the consent of the parties to the filing of this brief is not required.

INTEREST OF THE AMICUS CURIAE

The State of Colorado is unique in its geographic placement in the United States. Seven major rivers have their headwaters within the mountains of Colorado. The water diverted for use in Colorado is used and reused many times over from the time it collects into the streams and rivers of Colorado until it reaches a point of destination in the ocean. Colorado is upstream of 18 states and an undetermined number of Indian tribes which may seek to promulgate water quality standards. Colorado has a keen interest in assuring the continued availability of clean, healthful water both for the use of its citizens and visitors and for the use of the rest of the downstream states.

Colorado strongly supports the concepts and goals expressed in the Clean Water Act ("CWA") and its amendments.[2] However, the State of Colorado believes that the CWA provides the framework for resolving interstate differences with respect to water quality through negotiation of interstate agreements and compacts as specifically provided for by the CWA, § 103.[3] The ruling of the Tenth Circuit Court of Appeals in no way furthers the goals and interests mandated by the CWA, but instead frustrates the amicable and cooperative solution of interstate water quality matters by pitting upstream and downstream states against each other. Colorado is

[2] For the purposes of this brief, the Federal Water Pollution Control Act, as amended by the Water Quality Act of 1987 and as codified at 33 U.S.C. §§ 1251-1387, shall be referred to as the Clean Water Act or "CWA."

[3] 33 U.S.C. § 1253.

concerned that if this decision is upheld, the implementation of the CWA may result in inconsistencies with interstate compacts allocating water quantity, prohibitions on economic activity in upstream states that would result in impermissible burdens on interstate commerce, and chaos in the water quality planning process.

For these reasons, the State of Colorado has a compelling interest in the issues presented by this case and respectfully urges this Court to reverse the decision of the Tenth Circuit.

SUMMARY OF THE ARGUMENT

The Clean Water Act does not contemplate that states will resolve basic issues related to interstate water quality in the context of an individual discharge permit, but rather through interstate agreements and compacts involving all affected and interested states. The CWA directs the Administrator of EPA and the states to work cooperatively to resolve interstate issues, which could include numeric standards, classifications, waste land allocations and regional wastewater treatment planning, among others.

The Tenth Circuit erred by determining that EPA has no discretion in how downstream state water quality standards are implemented in an upstream discharge permit, and by substituting its interpretation and implementation of the Oklahoma water quality standards for that of EPA. The CWA is designed to permit states to determine the beneficial uses of water within their

boundaries and to apply standards which protect such uses.[4] These water quality standards are reviewed by EPA against the goals and requirements of the CWA, and if consistent with the federal act, are approved by EPA.[5] When EPA, or a state implementing an EPA-approved permit program, considers issuing or renewing a discharge permit, it is these state-determined and EPA-approved standards which must be met.[6]

The statute provides a mechanism by which another state may be heard as to its concerns with a proposed permit.[7] Congress has established EPA as the arbiter in determining whether a downstream state's concerns are valid and compelling, in those instances where compliance with water quality standards is raised in the context of a specific permit. Where, as in the case at hand, EPA determines after proper process and consideration that no adverse impact will result to the downstream state, the Court may not substitute its judgment for that of EPA.[8] Section 402 is not intended as the forum for resolution of broader water quality issues, nor as an opportunity for one state to exercise unilateral veto over all discharges in an upstream state.

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[4] CWA §§ 101(g), 303.

[5] CWA § 303.

[6] CWA § 401(a)(1).

[7] CWA §§ 402(b), 401(a)(2).

[8] *EDF v. Costle*, 657 F.2d 275 (D.C. Cir. 1981).

Further, the Tenth Circuit's judicial expansion of the statutory mandate of the CWA to allow unilateral power of one state over the granting of any and all permits in another state, as it has ruled here, has the potential to foreclose all future development of public and private facilities in upstream states, an impermissible interference with interstate commerce. Such a result is not an accurate reflection of either the language of the CWA or the intent of Congress.

The State of Colorado concurs with the arguments made by Amici States Nevada, et al., in their brief. Colorado believes certain additional arguments have not been articulated for the Court by other parties and will focus its brief on those issues.

ARGUMENT

I. THE CLEAN WATER ACT ENCOURAGES AND MANDATES COOPERATION, NOT CONFRONTATION, AMONG THE STATES REGARDING MATTERS OF INTERSTATE WATER QUALITY.

Section 101 (b) of the CWA states the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Chapter . . . ."

Section 101 (g) of the CWA further provides that "[i]t is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Chapter. It is the further policy of Congress that nothing in this Chapter shall be construed to supersede or abrogate rights to water which have been established by any State . . . ."

It is clear from these sections that Congress intended for the states to exercise responsibility for achieving the goals of the Act, and that the water quality goals of the Act are not to abrogate or impair the water quantity framework of the states, including the interstate compacts approved by Congress which control the allocation of a portion of the water which originates in the State of Colorado.

That Congress did not intend the adversarial position among upstream and downstream states which will result from the Tenth Circuit ruling is clear from another section of the CWA. Section 103 provides as follows:

> Sec. 103. (a) The Administrator shall encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution, encourage the enactment of improved and, so far as practicable, uniform State laws relating to the prevention, reduction, and elimination of pollution; and encourage compacts between States for the prevention and control of pollution.
>
> (b) The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by the Congress.

(Emphasis added)

Thus, the mandate of Congress is not for states to use the discharge permitting process as an arena for resolving water quality disagreements and not to permit a downstream state to prohibit upstream development, but to pursue such water quality issues through interstate compacts, the negotiation of which can include all affected and interested states on a river system.

The use of interstate compacts has long been favored over protracted litigation among sovereign states. As this Court said in *Colorado v. Kansas*, 320 U.S. 383, 392 (1943), dealing with the apportionment of the use of water quantity by each state:

> The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions,

> necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.

In the various Western water quantity apportionment cases before this Court,[9] the Court has recognized a preference for resolving interstate water allocation matters by agreement or compact whenever possible to avoid time-consuming litigation. As this Court is well aware from these cases, such litigation among two or more states over technical matters can require many years of evidentiary trial. The allocation of water quality assimilative capacity is very similar to allocation of water quantity in that it requires a basin-wide cooperative and equitable distribution to ensure that each state maintains a reasonable balance of power and equitable use of common natural resources. Judicial economy is not served by invoking this Court's original jurisdiction to resolve highly technical matters which can only be addressed by cooperative compromise. Many water quantity compacts have been entered into voluntarily in lieu of protracted original jurisdiction litigation. However, in the water quality area, the states are also

[9] *See, e.g., Colorado v. Kansas*, 320 U.S. 383 (1943); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Arizona v. California*, 373 U.S. 546 (1963).

subject to Congressional direction[10] to cooperate in resolving disagreements which has never been present in the water quantity disputes.

Without the equitable allocation of water quantities among states on the various Western rivers, accomplished by compact or judicial decree, each state downstream of Colorado would have been compelled to participate in the litigation of each and every water rights application filed in Colorado on a given river system. The burden this would have placed on the downstream states, as well as on the individual water rights applicants and the State of Colorado, is unfathomable. The situation presented by the Tenth Circuit's ruling is likewise unfathomable. Just as water quantity has been addressed by multi-state agreements and compacts, so must the broad issues of water quality be determined rather than by piecemeal process, permit by permit, and rulemaking by rulemaking.

That such cooperation and collaboration can occur and is a suitable way to deal with water quality issues affecting all states in a stream basin is clear from the results of the Colorado River Basin salinity agreements. The history of the issue and its resolution is well documented by the United States Court of Appeals for the District of Columbia Circuit in *EDF v. Costle*, 657 F.2d 275 (1981).

Without reiterating all of the Court of Appeals' discussion in that case, suffice it to say that salinity as an interstate pollution issue would be virtually impossible to

[10] CWA § 103.

resolve without the basin-wide approach adopted by the seven basin states and embraced by Congress in the Colorado River Basin Salinity Control Act.[11] The alternative to this basin-wide approach under the Tenth Circuit's scheme of things would be for each state downstream of Colorado to protest, litigate and prohibit all discharges and water diversions in the name of complying with state and federal water quality standards for salinity.

The special significance of § 103(b) of the CWA should not be overlooked. Article I, Section 10, Clause 3 of the United States Constitution prohibits a state from entering into any agreement or compact with one or more other states without consent from Congress.[12] Section 103(b) provides express consent from Congress for the states to proceed by compact to resolve interstate water quality issues and demonstrates the recognition of Congress that such matters are not otherwise appropriately resolved within the statute, and need to be addressed in a broader forum than the statutory permitting process.

II. THE CWA DOES NOT GIVE DOWNSTREAM STATES ABSOLUTE VETO POWER OVER UPSTREAM DISCHARGES

The Tenth Circuit has strained reasonable interpretation of the CWA to arrive at what is essentially a

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[11] Colorado River Basin Salinity Control Act, 43 U.S.C. §§ 1571-1599.

[12] "No state shall, without consent of Congress . . . enter into any Agreement or Compact with another State. . . ." U.S. Const. art. I, § 10, cl. 3.

veto power by downstream states over discharges in upstream states. Neither the statutory language nor the intent of Congress support this result, and in fact, in light of § 103 which favors negotiation of interstate compacts, this result upsets and disturbs the balance of power established by Congress in water quality matters.

By ruling that EPA has no discretion in applying the water quality standards of a downstream state to an upstream state discharge permit, and by holding that application of the downstream water quality standards, such as the antidegradation standard of Oklahoma, prevents issuance of any discharge permit, the Tenth Circuit has ignored the remedy selected by Congress to deal with interstate water quality issues and has instead attempted to vest control of upstream development and economic activity with the downstream state. Such a result ignores the fundamental premise of the union of sovereign states and the respective equality of each state within that union.

To reach this result the Tenth Circuit has discarded the well reasoned logic enunciated by this Court in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), wherein the Court determined that it is not proper or permissible for a state to impose its state water quality standards upon a discharger of another state. The Tenth Circuit did this in part by determining that state water quality standards, once approved by EPA, become federal law or regulation. This logic is faulty for several reasons.

First, virtually all state water quality standards, which are implemented through discharge permits as effluent limitations, are approved by EPA. State standards are to be automatically approved by EPA, pursuant to § 303(c), if

they meet the federal CWA standards. Moreover, § 510 provides that EPA must approve state standards that are more stringent than the federal standards. Thus, any downstream state can adopt an antidegradation or other no-discharge water quality standard more stringent than required by the CWA, which must be approved by EPA without discretion and without consideration or balancing of the impact to upstream states.

The Tenth Circuit has also missed the distinction between EPA "approved" and EPA "promulgated" water quality standards. Simple approval by EPA does not give state standards any federal status.[13] When EPA promulgates standards or regulations for national application, it is subject to certain procedural requirements, including publishing notice of the proposed regulation for public review and comment.[14] If these procedures ensuring due process to affected persons and states are not followed, the regulation is subject to judicial reversal.[15] State promulgated standards are not subject to the same national notice and comment requirements, thus there is no due process afforded interested and affected persons or states outside the borders of the promulgating state. Neither is

[13] Decision of the General Counsel No. 58 (EPA, March 29, 1977), *Memorandum: Revision of Water Quality Standards and Implementation Plans Under § 303 of the Federal Water Pollution Control Act*; *United States Steel Corp. v. Train*, 556 F.2d 822, 837 (7th Cir.) ("the standards are state, not federal regulations"); *Homestake Mining Co. v. EPA*, 477 F. Supp. 1279, 1284 (D.S.D. 1979).

[14] Administrative Procedure Act, 5 U.S.C. § 553.

[15] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

the EPA approval process contemplated by §§ 303(c) and 510 subject to the procedural and substantive due process requirements otherwise imposed upon federal regulations. In short, the Tenth Circuit has tried to accomplish, by declaring state water quality standards approved by EPA to have the force and effect of federal regulation, what EPA could not have done itself in promulgating federal standards.

As a practical matter, should the Court uphold the Tenth Circuit ruling, Colorado and its permittees would have no choice but to become involved in every standard setting proceeding in each of the states which are downstream to Colorado. This is impractical and unwarranted. Colorado has some 900 discharge permits, including approximately 400 domestic facilities and 500 industrial facilities. To suggest that each of them participate in every rulemaking proceeding of every downstream state to ensure fair and accurate water quality standards in each of those states is ludicrous. Five downstream states directly border Colorado and another 13 downstream states could have equally significant impacts on Colorado water quality standards and discharge permits. In addition, a presently undetermined number of Indian tribes are expected to assert authority under the CWA to promulgate water quality standards with the same force and effect as state water quality standards.[16]

Consider as well, that if one or more downstream state(s) objected to even ten percent of these permits, so that each of those ninety had to be litigated in the federal

[16] CWA § 518(e).

courts, multiplied by the number of upstream/downstream combinations, these matters would hopelessly clog the federal judicial calendar.

The fact that these examples are so ludicrous explains why Congress did not have in mind that states and permittees should have to participate in water quality standards setting in each state, or that constant litigation under § 402 of the CWA was the solution to interstate water quality matters.

Section 402 of the CWA clearly sets forth the procedure for issuance of discharge permits within each state. An opportunity for comment by another state is accorded. Once a decision to issue a permit is made, the statute provides that EPA is the final arbiter of whether the permit should issue, based upon a consideration of whether actual injury will result.

Matters such as waste load allocation for an interstate river where the maximum pollutant level exists are not provided for in § 303(d) but can be addressed in the context of an interstate compact. This is how EPA should have directed the controversy over the Fayetteville permit under the directive to EPA in § 103.

Section 103(a) requires EPA to encourage cooperation among the states and requires EPA to suggest resolution of problems such as those raised by Oklahoma by interstate compact. The obvious intent of Congress is that the interstate compact process is the only reasonable means of bringing together all the interested and potentially affected states on a stream or river system to allocate waste loads,

just as they allocate water quantity use allocations through such compacts.

III. INTERSTATE COMMERCE MAY NOT BE PROHIBITED BY STATE WATER QUALITY STANDARDS.

To follow the Tenth Circuit logic means that if any one or all of the states downstream from Colorado were to promulgate an antidegradation standard such as that of Oklahoma, Colorado would not be able to permit any more discharges in the state, thus placing the state in an untenable economic posture. Colorado believes this result constitutes an impermissible burden on interstate commerce.

The "dormant" commerce clause[17] has been used in discussions of state limitations on the transport of solid and hazardous wastes. This Court in *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), recognized that the need for national regulation and state cooperation in resolving interstate differences regarding the disposal of solid and hazardous wastes outweighed state interests in limiting acceptance of such wastes.

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[17] The implied limitation on state power recognized in the Commerce Clause has been referred to as the "dormant" or "negative" component of Congress's commerce power. *See generally Huron Portland Cement Co. v. Detroit*, 406 U.S. 170 (1960); *Browning-Ferris Inc. v. Anne Arundel County*, 292 Md. 136, 438 A.2d 269, 3 ERC 1712 (Md. Ct. App. 1980).

The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, empowers Congress "[t]o regulate Commerce . . . among the several states."

> In terms, the Clause is a grant of authority to Congress, not an explicit limitation on the power of the states. In a long line of cases stretching back to the early days of the republic, however . . . [the United States Supreme Court has] recognized that the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce.

Western & So. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652 (1981). As this Court has recognized, the scope of Congress's commerce power is vast.[18]

Indeed, in the absence of congressional action, the dormant Commerce Clause may be invoked by courts to determine whether state regulations impermissibly burden interstate commerce.[19]

As early as the case of *Gibbons v. Ogden*, 22 U.S. 1 (1824), this Court held that "the power to regulate commerce comprehends the control . . . of all navigable waters and includes . . . the power to keep them open and free from any obstructions."

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[18] *See Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

[19] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

> The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a state other than in which they lie. For this purpose, they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction from their navigation interposed by the states, or otherwise; to remove obstructions where they exist; and to provide, by such sanction as is deemed proper, against the incurrence of the evil, and for punishment of the offenders.

United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 59 (1913).[20]

In the Clean Water Act, however, Congress has spoken clearly on the subject of maintaining quality of this country's waters, and has provided direction in § 103 for the resolution of interstate water quality issues. By acting within the scope of its commerce power to regulate the quality of waters of the United States, it has superseded all state or local action that conflicts with it, including state regulations which are inconsistent with or discourage conduct the CWA is designed to foster.

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[20] *See also South Carolina v. Georgia*, 93 U.S. 4 (1876); *Wisconsin v. Duluth*, 96 U.S. 379 (1877); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *First Iowa Hydro-Elec. Co-Op v. Federal Power Comm.*, 328 U.S. 152 (1946); *Arizona v. California*, 373 U.S. 546 (1963); *Sporhase v. Nebraska Ex. Rel. Douglas*, 458 U.S. 941 (1982).

What could create more of an impermissible burden on interstate commerce than for a downstream state to promulgate and impose water quality standards which ban all new discharges upstream?

CONCLUSION

The State of Colorado urges this Court to carefully consider the broad and untenable ramifications which the Tenth Circuit's ruling has on the implementation of the goals and concepts of the Clean Water Act throughout this nation. The State of Colorado respectfully submits that this Court must reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

18 STATES RELY ON COLORADO'S WATER



(17) (10)

Nos. 90-1262 and 90-1266

In the Supreme Court of the United States

OCTOBER TERM, 1991

Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

STATE OF ARKANSAS, ET AL.,
Petitioners,
v.
STATE OF OKLAHOMA, ET AL.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,
v.
STATE OF OKLAHOMA, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE NATURAL RESOURCES DEFENSE COUNCIL, THE ENVIRONMENTAL DEFENSE FUND, THE NATIONAL WILDLIFE FEDERATION, AND AMERICAN RIVERS, INC. IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Clean Water Act permits the discharge of pollutants into an interstate waterway in an upstream State where that discharge will cause a violation of federally-approved water quality standards in a downstream State.

2. Whether, in issuing a discharge permit in an upstream State, the Environmental Protection Agency (EPA) may undermine a downstream State's federally-approved water quality standards by means of an interpretation contrary to the plain language of those standards.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1262

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BRIEF FOR THE NATURAL RESOURCES DEFENSE COUNCIL, THE ENVIRONMENTAL DEFENSE FUND, THE NATIONAL WILDLIFE FEDERATION, AND AMERICAN RIVERS, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The Natural Resources Defense Council, Inc. (NRDC) is a nonprofit organization representing over 113,000 members nationwide. NRDC and its members are dedicated to the protection of human health and the preservation, enhancement and defense of the natural resources of the United States, including U.S. rivers, streams, lakes and coastal wa-

ters. For nearly two decades NRDC has operated a Project on Clean Water to promote the reduction and ultimate elimination of the discharge of pollutants into U.S. waters.

The Environmental Defense Fund (EDF) is a national, not-for-profit organization with over 200,000 members dedicated to the protection of public health and the environment. Since its creation in 1969, EDF's staff of scientists, economists and attorneys has participated in administrative, legislative and judicial fora to encourage decision makers to adopt policies and practices that make wise use of natural resources and minimize pollution. EDF is presently engaged in legal and administrative actions to require the federal and state governments to promulgate more protective water quality standards and to enforce such standards in a manner that more effectively protects the nation's precious aquatic ecosystems.

The National Wildlife Federation (NWF) is the nation's largest, not-for-profit conservation education organization with approximately 5.6 million members and supporters. NWF has 53 state and territorial affiliated organizations, one of which—the Oklahoma Wildlife Federation—is a party to this proceeding. NWF and its members are dedicated to the wise management of the nation's natural resources, including its lakes and rivers. To that end, NWF's staff have worked at the federal, regional, state and local level to encourage full implementation of the Clean Water Act.

American Rivers, Inc. is a nonprofit conservation organization dedicated to the protection and restoration of America's rivers. With over 15,000 members,

American Rivers is the largest national conservation organization dedicated exclusively to river conservation. American Rivers actively works to strengthen and expand state scenic river and other types of state-level river protection programs.

As national environmental organizations, amici have a special interest in the two issues in this case, the resolution of which will significantly affect the quality of water nationwide. First, if EPA-approved state water quality standards are not enforceable against discharges originating across state borders, those standards would be badly undermined. Downstream States, contrary to the express intent of the Clean Water Act, would have no control over the influx of pollutants from sources that could be located strategically on the borders of upstream States. Second, amici are actively concerned with ensuring that the Environmental Protection Agency (EPA) faithfully enforces federally-approved state water quality standards when issuing discharge permits. The language and intent of the Clean Water Act would be frustrated if EPA, through "interpretation," could ignore the express language of a downstream State's federally-approved water quality standards.

SUMMARY OF ARGUMENT

Arkansas and its amici attempt to turn this case into a policy debate concerning the relative rights of upstream and downstream States. But the relevant policy issues have already been resolved by Congress. This case turns on plain language, the plain language of the Clean Water Act, which requires upstream discharges to satisfy the federally-approved water quality standards of downstream States, and the

plain language of Oklahoma's federally-approved water quality standards, which forbid any further discharge of pollutants into designated "scenic rivers" such as the Illinois River.

1. The Clean Water Act prohibits the discharge of any pollutant into the waters of the United States except when authorized by a permit. 33 U.S.C. 1311(a). Section 401(a)(2) of the Clean Water Act, 33 U.S.C. 1341(a)(2) (emphasis added), provides:

> Whenever * * * a discharge may affect, as determined by the [EPA] Administrator, the quality of the waters of any other State, the Administrator * * * *shall* so notify such other State * * * If * * * such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and * * * notifies the Administrator * * * and requests a public hearing * * *, the licensing or permitting agency *shall* hold such a hearing. * * * [The licensing or permitting] agency, based upon the recommendations of such State, * * * *shall* condition such license or permit in such matter as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency *shall not* issue such license or permit.

This provision makes it absolutely clear that a permit "shall not issue" unless it complies with the water quality requirements of any State whose waters will be affected by the proposed discharge. Whenever EPA determines that a discharge might affect water quality in another State, it *must* notify that State. If the notified State determines that the discharge will violate its water quality requirements,

EPA *must* (if the State requests) hold a hearing pursuant to 33 U.S.C. 1342(a), to consider the State's objections. If EPA decides to grant the permit, it *must* impose whatever conditions are "necessary to *insure* compliance with applicable water quality requirements." And if EPA cannot insure such compliance, then it *must* deny the permit.

Not only does the Clean Water Act itself require a permitting authority to determine whether a downstream State's water quality standards will be violated, EPA's implementing regulations do so as well. For example, 40 C.F.R. 122.4(d) (emphasis added) expressly provides: "No permit may be issued * * * [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of *all affected States*." To the same effect, EPA's rules require permits to include, where applicable, "any requirements * * * necessary to * * * [c]onform to applicable water quality requirements * * * when the discharge affects a State other than the certifying State [*i.e.*, the State in which the discharge will be located]." 40 C.F.R. 122.44(d)(4). Thus, even if the Clean Water Act itself were ambiguous on this issue—which it plainly is not—the Court would be required to accord deference to the consistent interpretation of the statute by the agency entrusted with its administration.

2. Under Oklahoma's federally-approved water quality standards, as they appeared at the time of Arkansas' permit application, Oklahoma's rivers "are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3." Oklahoma Water Quality Standards § 5

(1982) (J.A. at 46). Section 3 is the State's "Anti-Degradation Policy." In certain circumstances, it permits "lower water quality as a result of necessary and justifiable economic or social development" (J.A. 28). But the provision is quite clear that "[n]o degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreation or ecological significance. These include water bodies * * * designated [as] 'Scenic Rivers'" (*ibid.*). Thus, for scenic rivers, no exception is made by Section 3 to Section 5's otherwise absolute "prohibition of *any* new point source discharge of wastes." J.A. 46 (emphasis added). Oklahoma's water quality standards unambiguously forbid any new discharge of wastes into a scenic river.

It is undisputed that the Illinois River has been properly designated as a "scenic river." It is also undisputed that the permit at issue here would lead to the "discharge of wastes" into the Illinois River from "a new point source." It therefore follows that the permit is unlawful under the plain terms of Oklahoma's federally-approved water quality standards. EPA had no discretion to ignore those standards—through "interpretation" or otherwise—in the permit approval process.

In place of Oklahoma's clear directive, EPA proposes a much more imprecise standard: whether the discharge will have a "detectable impact on current water quality in the protected waters" (EPA Br. at 22). This replacement is altogether too fluid a standard to fairly reflect Oklahoma's "zero-discharge" policy. Oklahoma has said "no discharge of wastes into scenic rivers," and it plainly meant *no discharge of wastes*, not "some discharge" or "only a little." That is a policy choice that, under the Clean Water Act, Oklahoma was entitled to make and EPA, having reviewed and approved Oklahoma's water quality standards, must now enforce.

ARGUMENT

I. THE CLEAN WATER ACT REQUIRES DISCHARGES IN AN UPSTREAM STATE TO COMPLY WITH "APPLICABLE WATER QUALITY REQUIREMENTS," INCLUDING THE FEDERALLY-APPROVED WATER QUALITY STANDARDS OF AN AFFECTED DOWNSTREAM STATE

The Clean Water Act contemplates a partnership between the federal government and the States "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In the Act, Congress chose two mechanisms—one initiated by the federal government, the other by individual States—to ensure the reduction and eventual elimination of the discharge of pollutants. 33 U.S.C. 1251(a). First, the Administrator of EPA is charged with developing and promulgating uniform national technology-based standards, known as "effluent limitations guidelines," that all discharges into navigable waters—intrastate and interstate—must satisfy. 33 U.S.C. 1311 and 1314. Second, individual States are required to adopt water quality standards to assure protection of the waters within or flowing through those States. 33 U.S.C. 1313(a), (b) & (c)(1). These standards normally specify minimum concentrations of certain pollutants that must be achieved in state waters and narrative requirements such as the Oklahoma "antidegradation" rule at issue in this case. Where achieving these

standards in any body of water requires controls on a given source more restrictive than required by the national effluent limitations guidelines, the Act mandates imposition of such controls. 33 U.S.C. 1311 (b)(1)(C). The States are required to submit their water quality standards to EPA for review and approval. But, upon approval by EPA, a state-adopted water quality standard "shall thereafter be the water quality standard for the applicable water of that State." 33 U.S.C. 1313(c)(3).

The statute, therefore, establishes a federal floor for all discharges and permits individual States to designate uses for particular waters within those States such that compliance with the water quality standards needed to protect those uses may require more stringent limitations on discharges. There is obviously a basic dilemma created by such a scheme, which is how to treat interstate waterways. An upstream State has the practical ability to control the quality of interstate waters by setting and enforcing its own water quality standards and releasing water of that quality. If the upstream State's water quality standards are lower than those considered desirable by a downstream State, so will be the actual quality of the water flowing into the downstream State. "In other words," as the Court of Appeals noted, "the lowest common denominator will prevail." EPA Pet. App. 14a. By contrast, if the higher standards of a downstream State are applied to discharges originating in an upstream State, then the upstream State will be required to adapt to those higher standards.

Arkansas and its various amici accordingly state the initial question presented in this case in terms of

a fundamental policy dilemma: Should the downstream State be forced to accept waters polluted by an upstream State, or should the upstream State be forced to adapt itself to the environmental aspirations of the downstream State? Policy arguments could indeed be made in favor of either answer. But Congress has already made its policy choice in the Clean Water Act.

Section 401(a)(2), 33 U.S.C. 1341(a)(2), expressly provides that EPA "shall not issue" a permit to allow a discharge of pollutants in an upstream State if "such discharge will affect the quality of [another State's] waters so as to violate any water quality requirement in such State * * *." That mandate is reinforced by several other sections of the Clean Water Act as well as a number of EPA regulations implementing the Act. All of these provisions clearly establish that a source in an upstream State may not discharge pollutants into an interstate waterway where that discharge will cause a violation of the federally-approved water quality standards of a downstream State.

A. The Plain Language Of The Clean Water Act And EPA Regulations Promulgated Pursuant To That Act Forbid Issuance Of A Discharge Permit In An Upstream State That Will Cause A Violation Of The Federally-Approved Water Quality Standards Of A Downstream State

In order to achieve and enforce both federal effluent limitations guidelines and state water quality standards, the Clean Water Act established the "national pollutant discharge elimination system" (NPDES) permit program. 33 U.S.C. 1342. The Act prohibits the discharge of any pollutant into the waters of the United States except when authorized

by an NPDES permit. 33 U.S.C. 1311(a). And, most importantly for purposes of this case, the Act prohibits EPA from issuing a permit for a discharge in one State that will cause a violation of the water quality standards of another State.[1]

Section 401(a)(2) of the Clean Water Act, 33 U.S.C. 1341(a)(2) (emphasis added), provides:

> Whenever * * * a discharge may affect, as determined by the [EPA] Administrator, the quality of the waters of any other State, the Administrator * * * *shall* so notify such other State. * * * If * * * such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and * * * notifies the Administrator * * * and requests a public hearing * * *, the licensing or permitting agency *shall* hold such a hearing. * * * [The licensing or permitting] agency, based upon the recommendations of such State, * * * *shall* condition such license or permit in such matter as may be *necessary to insure compliance* with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency *shall not* issue such license or permit.

This provision, which bristles with imperatives, makes it absolutely clear that a permit "shall not

[1] The Act provides that EPA will issue NPDES permits except in those States where EPA has approved a state permit program pursuant to 33 U.S.C. 1342(b). At the time that Fayetteville sought the permit at issue here, Arkansas did not have an approved permit program. EPA was thus the permitting agency. As noted below, however, the water quality standards of Oklahoma would have been equally applicable had Arkansas been the permitting authority.

issue" unless it complies with the water quality requirements of any State whose waters will be affected by the proposed discharge. Whenever EPA determines that a discharge might affect water quality in another State, it *must* notify that State. If the notified State determines that the discharge will violate its water quality requirements, EPA *must* (if the State requests, hold a hearing pursuant to 33 U.S.C. 1342(a), to consider the State's objections. If EPA decides to grant the permit, it *must* impose whatever conditions are "necessary to *insure* compliance with applicable water quality requirements." And if EPA cannot insure such compliance, then it *must* deny the permit.

It is impossible to escape this plain language. Arkansas' suggestion (Br. at 16) that the phrase "applicable water quality requirements" in Section 401(a)(2) refers only to the water quality standards of the source State is simply absurd. Subparagraph 1 of Section 401(a)—which provides that no NPDES permit may be granted until a "certification" is obtained from the State in which the discharge originates stating that the discharge will comply with applicable water quality requirements—already ensures that the water quality standards of the source State will be met. The whole purpose of subparagraph 2 of that section is to enable other affected States to ensure that their water quality will not be jeopardized by the proposed discharge.

Given that Section 401(a)(2) deals expressly with effects on States other than the source State, the word "applicable" can only refer to those federally-approved water quality requirements of any downstream State that will receive pollutants discharged

in the source State. As EPA itself explains, "[b]efore issuing a permit authorizing discharges into an interstate waterway, EPA *must* determine that the proposed permit will meet all applicable requirements of the Act and implementing regulations, *including compliance with federally approved water quality standards of the receiving State.*" EPA Br. at 14 (emphasis added). See also *ibid.* (emphasis added) (noting that the issue in the case is whether EPA "reasonably interpreted and applied *applicable Oklahoma water quality standards*").

The federally-approved water quality standards of the downstream State are also binding upon discharges in an upstream State where the upstream State is the permitting authority. In those States with approved permit programs, the source, or permit-issuing, State must notify all other States, "the waters of which may be affected," of a permit application contemplating such discharges. 33 U.S.C. 1342(b)(3). Each potentially affected State must then be afforded an opportunity to "submit written recommendations to the permitting State" and to EPA regarding the application. 33 U.S.C. 1342 (b)(5). If any part of those recommendations is not accepted by the permitting State, that State must notify the affected State and EPA. 33 U.S.C. 1342 (b)(5).

The permitting State must then submit to EPA a copy of each proposed permit involving an interstate waterway before it may be issued. 33 U.S.C. 1342 (d)(1) and (2); 40 C.F.R. 123.24(d). If EPA determines that issuance of the permit would be "outside the guidelines and requirements" of the Act then "[n]o permit shall issue." 33 U.S.C. 1342(d)(2). Since a permit that will cause violations of the federally-approved water quality standards of a downstream State is "outside the guidelines and requirements" of the Act, such a permit may not be issued.

The paragraph immediately following this veto provision, 33 U.S.C. 1342(d)(3), states that "[t]he [EPA] Administrator may, as to any permit application, waive paragraph (2) of this subsection." But EPA's discretion arises only with respect to its authority to choose to review or not review a permit application of which it is notified by a permit-issuing State pursuant to 33 U.S.C. 1342(d)(1). Once EPA chooses to review a proposed permit under this section, it does not have "discretion" to overlook a violation of the federally-approved water quality standards of a downstream State. See EPA Pet. App. at 37a-38a n.19; *Mianus River Preservation Comm.* v. *Administrator, EPA*, 541 F.2d 899, 907-09 (2d Cir. 1976).

Not only does the Clean Water Act itself require a permitting authority to determine whether a downstream State's water quality standards will be violated, EPA's implementing regulations do so as well. For example, 40 C.F.R. 122.4(d) (emphasis added) expressly provides: "No permit may be issued * * * [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of *all affected States.*" To the same effect, EPA's rules require permits to include, where applicable, "any requirements * * * necessary to * * * [c]onform to applicable water quality requirements * * * when the discharge affects a State other than the certifying State [*i.e.*, the State in which the discharge will be located]." 40 C.F.R. 122.44(d)(4).

Thus, even if the Clean Water Act itself were ambiguous on this issue—which it plainly is not—the

Court would be required to accord deference to the consistent interpretation of the statute by the agency entrusted with its administration. See, *e.g.*, *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); cf. *E.I. DuPont De Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.25 (1977) (EPA interpretation entitled to deference, even if not contemporaneous with enactment of CWA, in light of technical nature of statute, agency's expertise, and ambiguous statutory language).

B. The Policies Of The Clean Water Act And Applicable Case Law Confirm That An Upstream State May Not Discharge Pollutants Into An Interstate Waterway That Will Violate The Federally-Approved Water Quality Standards Of A Downstream State

Arkansas and its various amici, in arguing that the source State may completely ignore the federally-approved water quality standards of affected downstream States, never come to grips with the precise language of the Clean Water Act. Instead, they indulge in a hodgepodge of policy arguments and rely heavily on dicta ripped from prior cases. Neither of these sources, however, is sufficient to counteract the plain terms of the statute and EPA's implementing regulations. Moreover, none of the arguments based on these sources is convincing even on its own terms.

The goal of the Clean Water Act is stated clearly in one of its opening provisions: the "prevention, reduction, and elimination of pollution" in the Nation's waters. 33 U.S.C. 1251(b). The Act devised a two-step process to achieve that goal. The first step was to improve water quality sufficiently for the

"protection and propagation of fish, shellfish, and wildlife and * * * for recreation in and on the water." 33 U.S.C. 1251(a)(2). The second step, and ultimate goal, is the *total elimination* of discharged pollutants. 33 U.S.C. 1251(a)(1).

This goal is obviously ambitious and far from achieved. But the rest of the Act must still be read in light of that lofty aspiration. Arkansas' contention that all discharging States should be able to set and indefinitely maintain pollutant levels at the federally-mandated minimum acceptable level thus seriously misunderstands the fundamental purpose of the Clean Water Act. It is clearly the intention of the Act to encourage individual States to adopt water quality standards stricter than the federal minimum. Allowing upstream dischargers to expel effluents at a level which achieves only the minimum requirement on interstate waterways would effectively negate the higher standards of downstream States.

Section 301(b)(1)(C) of the Act, 33 U.S.C. 1311(b)(1)(C) (emphasis added), provides:

> In order to carry out the objectives of [the Act] there *shall be achieved* not later than July 1, 1977, *any* more stringent limitations, including those necessary to meet water quality standards * * * established pursuant to *any* State law or regulations * * * or required to implement *any* applicable water quality standard established pursuant to this chapter.

In order to ensure that the EPA-approved water quality standards in all States are "achieved," it is obviously "necessary" to require dischargers to meet the applicable requirements of other affected States as well as those of the source State. There could be

no assurance of achieving a downstream State's more stringent water quality standards if an upstream, out-of-state discharger were not required to comply with those standards. As EPA explained below, Arkansas' construction of the Act would make achieving downstream water quality standards "impossible in many circumstances or * * * possible * * * only by imposing a disproportionate burden on dischargers located in the downstream state." EPA Br. at 21 (cited in EPA Pet. App. at 25a).

Faced with a choice between two possibilities—upstream States dragging others down to their minimum standards and downstream States pulling others up to their higher standards—Congress plainly, and sensibly, chose the latter. This is not to say that the downstream State "imposes" its standards on the upstream State, but rather that the Clean Water Act mandates compliance with federal law, including the federally-approved water quality standards of affected States. Any standard or limitation adopted by a State and approved by EPA becomes the "water quality standard for the applicable waters of that State," and thus is federally enforceable. 33 U.S.C. 1313(c)(3). See also 33 U.S.C. 1319, 1342.[2]

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[2] Arkansas and its amici attempt to raise Commerce Clause and even Tenth Amendment concerns around the assertion that Oklahoma is attempting to "extend its regulatory authority into another state." Arkansas Br. at 31 n.44. See also Brief of Mountain States Legal Foundation at 15-20; Brief of Colorado Water Congress, et al. at 19. Aside from the fact that these issues were never raised or decided below, the arguments are frivolous. Once Oklahoma's standards are approved by EPA, they become federally-enforceable under the Clean Water Act and thus are properly applied to limit discharges in another State sharing the same waterway.

Congress was far more concerned that upstream States would become "pollution havens" than that downstream States would be unrealistically strict in their standards. Indeed, with a stated aspiration of "permitting no discharge of pollutants" (33 U.S.C. 1316(a)(1)), Congress did not concede that any standards could be too strict. But it did clearly recognize the danger that rewarding sources for locating in States with less stringent water quality requirements (by relieving them from complying with more stringent downstream water quality standards) would result in "pollution shopping."[3] A source located immediately above a state boundary would not be required to meet the more stringent requirements, if any, of the downstream State, even though that State may be most affected by the discharge. The Administrative Law Judge in the instant case expressed precisely this concern, stating that interpretations of the Clean Water Act that did not enforce the stricter downstream standards "would allow a source to locate its discharge just across the line in Arkansas and freely violate Oklahoma standards. Such a result is contrary to the [Clean Water Act], regulations and Court decisions." Decision on Remand, R., A-33, at 4-5 (quoted in EPA Pet. App. at 19a).

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[3] When it amended Section 402 of the Act in 1977 to authorize EPA to issue an NPDES permit where it determines a state-issued permit is inadequate, the Senate committee stated: "EPA has been much too hesitant to take any actions where States have approved permit programs. The result might well be the creation of pollution havens in some of those States which have approved permit programs. This result is exactly what the 1972 amendments were designed to avoid." S. Rep. No. 370, 95th Cong. 1st Sess. at 73, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4398.

Arkansas and all of its amici cite *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), in support of their construction argument, but that reliance is misplaced. In that case an affected State was seeking to enjoin an ongoing discharge in another State by resort to its own state law nuisance remedies. *Id.* at 483. In contrast, this case is a permitting, rather than an enforcement, action wherein Oklahoma seeks simply to ensure compliance with federal law, *i.e.*, its EPA-approved water quality standards.[4]

The specific issue in *Ouellette* was whether the Clean Water Act preempts a common law nuisance suit filed in a Vermont court under Vermont law against a New York discharger. The Court simply concluded that "Vermont nuisance law is inapplicable to a New York point source," 479 U.S. at 497. The Court noted that "[i]t would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *Ibid.* But the Court stressed that nothing in its decision affected the plaintiff's right to "pursue remedies that may be provided by the Act." *Id.* at 498 n.18. Plainly, *Ouellette* was concerned not with the Clean Water Act's provision for incorporating a downstream State's water quality standards in the permitting process, but with preventing a downstream State from circumventing or superceding the process by imposing on an already-permitted source additional requirements based on its own state law.

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[4] *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), and other cases relied on by Arkansas and its amici are distinguishable on the same grounds.

The only cases actually discussing the precise question at issue here state that the Clean Water Act prohibits interstate violation of federally-approved water quality standards. For example, in *Montgomery Envt'l Coalition* v. *Costle*, 646 F.2d 568, 594 n.21 (D.C. Cir. 1980), the D.C. Circuit noted that downstream States can block permits until discharging States comply with the mandated water quality standards. And in *Lake Erie Alliance for the Protection of the Coastal Corridor* v. *U.S. Army Corps of Eng'rs*, 526 F.Supp. 1063, 1075 (W.D.Pa. 1981), aff'd without opinion, 707 F.2d 1392 (3d Cir.), cert. denied, 464 U.S. 915 (1983), the Court noted that the notice requirement in 33 U.S.C. 1341(a)(2) was designed "to enable a state whose water qualities may be affected by the proposed federal activity an opportunity to insure that its standards will be complied with."

II. THE PERMIT AT ISSUE IN THIS CASE WOULD VIOLATE OKLAHOMA'S FEDERALLY-APPROVED WATER QUALITY STANDARDS, WHICH UNAMBIGUOUSLY FORBID THE DISCHARGE OF ADDITIONAL POLLUTANTS INTO THE ILLINOIS RIVER

Under Oklahoma's federally-approved water quality standards, as they appeared at the time of Arkansas' permit application, Oklahoma's rivers "are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source except under conditions described in Section 3." Oklahoma Water Quality Standards § 5 (1982) (J.A. at 46). Section 3 is the State's "Anti-Degradation Policy." In certain circumstances, it permits "lower water quality as a result of necessary and justifiable economic or social development" (J.A. 28). But the provision is quite clear that "[n]o

degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies * * * designated [as] 'Scenic Rivers' " (*ibid.*). Thus, for scenic rivers, no exception is made by Section 3 to Section 5's otherwise absolute "prohibition of *any* new point source discharge of wastes." J.A. 46 (emphasis added). Oklahoma's water quality standards unambiguously forbid any new discharge of wastes into a scenic river.

It is undisputed that the Illinois River has been properly designated as a "scenic river." [5] It is also undisputed that the permit at issue here would lead to the "discharge of wastes" into the Illinois River from a "a new point source." [6] It therefore follows that the permit is unlawful under the plain terms of Oklahoma's federally-approved water quality standards. EPA had no discretion to ignore those standards—through "interpretation" or otherwise—in the permit approval process.

The Clean Water Act creates a unique federal-state partnership. The States promulgate water quality standards, and EPA reviews, approves, and helps to enforce those standards. Within this part-

[5] Oklahoma vigorously enforces its "no discharge" policy against all sources potentially affecting the Illinois River, whether in-state or out-of-state. Accordingly, as EPA notes (Br. at 19 n.23), no issue is raised in this case concerning the efficacy of a water quality standard that "has a discriminatory impact on out-of-state dischargers."

[6] For example, the ALJ estimated that 6 pounds of phosphorous alone would reach the Oklahoma border each day based on the Fayetteville plant's maximum allowable discharge of 3.5 million gallons of effluents daily. Ark. Pet. App. 129a.

nership, however, Congress sought to "preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b).[7] The approval process does not grant EPA a license to water down the standards promulgated by a State through an "interpretation" completely at odds with the plain language of those standards.

This is not to say, as Arkansas contends (Br. at 27), that federal review consists merely of an automatic approval. EPA must determine whether the proposed water quality standards are "consistent with the requirements of the Act." 33 U.S.C. 1313 (a). EPA's regulations require States to specify "the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. 131.2. And EPA reviews the scientific validity of those criteria in order to determine whether they support the designated beneficial uses. See *Mississippi Comm'n on Natural Resources* v. *Costle*, 625 F.2d 1269, 1276 (5th Cir.

[7] This provision preserves States' roles so long as their standards and programs are consistent with, *i.e.*, at least as strict as, the Act. Senator Muskie, the Senate floor manager and one of the principal architects of the Clean Water Act, explained in colloquy that deference to the States under section 101(b) applies only so long as State actions are consistent with the goals and objectives of the Act. House Committee on Public Works, Water Pollution Control Act Amendments of 1972, H.R. 11896, 93rd Cong., 1st Sess., *reprinted in* 2, Legislative History of the Water Pollution Control Act Amendments of 1972, at 1315 (1972); see also *id.* Vol. 1 at 245-246 (statement of Rep. Harsha).

1980) (EPA may "require states to justify standards not in conformance with the criteria policy").[8]

It is clear, however, that the Administrator cannot reject a State's water quality standard solely on the grounds that it is too strict. As EPA itself has acknowledged, the Agency is not authorized "to disapprove a State water quality standard on the basis that EPA considers the standard to be too stringent." 54 Fed. Reg. 39,099 (Sept. 22, 1989). See also, *e.g.*, *Mianus River Preservation Comm.* v. *EPA*, 541 F.2d 899 (2d Cir. 1976); *Homestake Mining Co.* v. *EPA*, 477 F. Supp. 1279 (D.S.D. 1979). Oklahoma has adopted a strict "zero-discharge" policy for its scenic rivers. Just as EPA could not disapprove that policy on the grounds that it was too strict so, too, EPA cannot transform that policy, through "interpretation," into something less strict.

EPA argues against a "zero-discharge" requirement on policy grounds. See EPA Br. at 28-29. But EPA never comes to grips with the operative language of Section 5, which establishes just such a requirement. Moreover, EPA completely ignores the fact that Oklahoma's "zero-discharge" policy is fully in keeping with the stated goal of the Clean Water Act, which is not just to reduce, but actually to "eliminate," pollution. 33 U.S.C. 1251(b).[9]

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[8] In evaluating state water quality standards EPA discourages state-wide, uniform water quality standards, noting that "blanket application of the criteria to all waters under all circumstances may not always be prudent or reasonable." *EPA Guidance for State Implementation of Water Quality Standards*, Env't Rep., Federal Laws (BNA) § 21, at 4623 (Dec. 12, 1988).

[9] Congress, in Section 303(d)(4)(B) of the Act, 33 U.S.C. 1313(d)(4)(B), expressly recognized the validity of an "anti-degradation" policy when it provided that, in situations where meeting state water quality standards requires technology beyond the industrial effluent limits attainable through the best available technology specified by EPA, neither a State nor EPA may revise a permit limit or other water quality standard unless "such revision is subject to and consistent with the antidegradation policy."

EPA's position is particularly remarkable in light of the fact that EPA itself interpreted its "model" antidegradation regulation (40 C.F.R. 35.1550(e)(2))—the very regulation EPA claims (EPA Br. at 23 n.27) Oklahoma followed in developing its water quality standards—as embodying a "zero-discharge" policy. In a 1979 Memorandum on Outstanding National Resource Waters (ONRW), EPA's Office of the General Counsel explained:

> We are not sure why *any* water quality standard would be necessary for an ONRW, since the standard is *no* degradation; it would seem that arguments over *x* or *y* micrograms per cubic meter would be irrelevant. Whenever a new point source applied for a permit to discharge into an ONRW, we could simply deny the permit (or force the State to deny the permit through our veto power) under § 301(b)(1)(C), which requires compliance with all State laws.

Memorandum from James Rogers, Associate General Counsel, Water and Solid Waste Division, to Kenneth M. Mackenthun, Director, Criteria and Standards Division (Aug. 15, 1979).

EPA thus manifested its understanding that the "Tier 3 antidegradation standard" applicable to outstanding natural resource waters was, in fact, a "zero-discharge" requirement. And as recently as

June, 1991, EPA recognized that Oklahoma's federally-approved water quality standards embody a "zero-discharge" requirement for an ONRW such as the Illinois River. "Oklahoma," EPA explained, "currently maintains a strict antidegradation policy. * * * Requirements for Tier 3 waters, ONRW's, are implemented by allowing *no new point source discharges and no increased loading and concentration in existing permits.*" Diamond, William R., Director, Standards & Applied Sciences Division, *Newsletter: Water Quality Criteria & Standards* at 5 (June 1991) (emphasis added).[10] Thus, at the very same time it was preparing its brief in this case—offering one interpretation of Oklahoma's water quality standards for litigation purposes—EPA was offering a completely different interpretation of those standards in its official newsletter on water quality standards.

In place of Oklahoma's clear directive, EPA in this litigation proposes a much more imprecise standard: whether the discharge will have a "detectable impact on current water quality in the protected waters" (EPA Br. at 22). This replacement is altogether too fluid a standard to fairly reflect Oklahoma's "zero-discharge" policy.[11] Oklahoma has said "no discharge

[10] Copies of this EPA newsletter have been filed with the Clerk of the Court and served on counsel for petitioners.

[11] Because EPA's "interpretation" is contrary to the plain language of Oklahoma's water quality standards, the Court need not even reach EPA's contention that EPA's interpretation of state-promulgated standards is entitled to the same deference that would be accorded EPA's interpretation of its own regulations. See EPA Br. at 20-21. In any event, that argument is highly questionable in light of Congress' explicit recognition of the "primary responsibilities and rights of states" to establish their own water quality standards (33

of wastes into scenic rivers," and it plainly meant *no discharge of wastes*, not "some discharge" or "only a little."

EPA's proposed standard raises the inherently imprecise, even subjective, question of when a discharge of pollutants is serious enough to cause a "detectable" worsening of water quality. Oklahoma avoids this uncertain morass by stating clearly that *any* additional discharge of pollutants is too much in a designated scenic river.[12] That is a policy choice that EPA is not permitted, under the Clean Water Act, to reject, whether by disapproving Oklahoma's standard *ab initio* or by "interpreting" it away.

Defining a prohibition in terms of precise amounts of pollutants discharged, as opposed to a more uncertain and subjective focus on a change in water quality, is standard practice in environmental law. Courts have uniformly supported enforcement of discharge restrictions without an explicit showing of actual injury to the waters in question.[13] EPA itself, in argu-

U.S.C. 1251(b)) and in light of the fact that EPA has no authority to disapprove state standards on the grounds that they are too strict.

[12] It is ironic, therefore, that EPA (Br. at 28) criticizes Oklahoma's standard as creating "practical difficulties * * * of implementation." Oklahoma's standard is a model of clarity and simplicity compared with the alternative proposed by EPA. Indeed, the imprecision and uncertainty that would be introduced by accepting EPA's alternative standard is clear from EPA's own admission (Br. at 24) that it "has not attempted to prescribe general standards for determining what constitutes a 'lowering' of water quality."

[13] See, *e.g.*, *Chevron, USA* v. *Yost*, 919 F.2d 27 (5th Cir. 1990) (discharging foreign substance violates the Clean Water Act without a showing of actual injury); *PIRG* v. *Powell*

ing for penalties to be imposed against violators of the Clean Water Act, has recognized that "all pollutants introduced into the environment create some harm or risk, * * * and it will be difficult in many cases to precisely quantify the harm or risk caused by the violation in question." *EPA Civil Penalty Policy* at 10 (July 8, 1980). The State of Oklahoma has also recognized this risk and found it unacceptable where scenic rivers are concerned. Accordingly, it has resolved to "prohibit[] any new point source discharge of wastes" into those rivers. That is a policy choice that, under the Clean Water Act, Oklahoma is entitled to make and EPA, having reviewed and approved Oklahoma's water quality standards, must now enforce.

Duffryn Terminals, Inc., 720 F. Supp. 1158, 1167 (D.N.J. 1989) (rejecting defendant's contention that no penalty is appropriate absent an adverse impact on the river into which it discharged pollutants), aff'd in part, rev'd on other grounds, 913 F.2d 64 (1990), cert. denied, 111 S.Ct. 1018 (1991); *PIRG of New Jersey* v. *Hercules Inc.*, 29 ERC (BNA) 1417 (D.N.J. 1989) (same); *PIRG of New Jersey* v. *C.P. Chemicals Inc.*, 26 ERC (BNA) 2017, 2021 (D.N.J. 1987) (reducing penalties due to limited or undetectable impact would result in a situation where "any permittee could ignore the requirements of its permit with impunity as long as it discharged into already heavily polluted waters").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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July 22, 1991

(19) (18)

Nos. 90-1262 and 90-1266

FILED
JUL 22 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ARKANSAS, *et al.*,
Petitioners,
v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,
v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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AMICI BRIEF OF THE U.S. SENATOR FROM OKLAHOMA, DON NICKLES JOINED BY THE U.S. SENATOR FROM OKLAHOMA, DAVID BOREN IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1262

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

No. 90-1266

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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AMICI BRIEF OF THE U.S. SENATOR FROM OKLAHOMA, DON NICKLES JOINED BY THE U.S. SENATOR FROM OKLAHOMA, DAVID BOREN IN SUPPORT OF RESPONDENTS

The Senators from Oklahoma, representing the people of Oklahoma, submit this brief as *amici curiae* in support of the respondents and urge this Court to uphold the decision by the U.S. Court of Appeals for the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

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[1] The consent of counsel for each of the parties has been obtained and a letter from each counsel indicating his consent to the filing of this brief has been filed with the Clerk.

INTEREST OF THE *AMICI CURIAE*

The Senators from Oklahoma have a compelling interest in this case. It is crucial that the Tenth Circuit's decision be upheld to ensure that Oklahoma's Illinois River remains one of the most beautiful rivers in the entire country, and to ensure that the national interest in eliminating water pollution be protected. Any abrogation of this decision would deny Oklahoma and other states the right to establish and enforce water quality standards as the Clean Water Act, 33 U.S.C. § 1251-1387, intended.

As Members of Congress, the Amici Senators have a special interest in the interpretation of the Clean Water Act. Being part of the legislative process gives the Senators an enhanced view of statutory construction and legislative intent. This unique perspective allows them to state authoritatively what Congress intended when creating the Clean Water Act. A proper interpretation of the Clean Water Act will protect not only Oklahoma's Illinois River, but will protect other states from ending up as a dumping ground for out-of-state pollutants. Water quality is a crucial issue, and the plain meaning of water quality standards must be upheld.

In 1972, the Clean Water Act created a scheme for approval or disapproval of discharges into interstate waters. The focal point of this scheme is the National Pollution Discharge Elimination System (NPDES) permit program, which utilizes State Water Quality Standards such as Oklahoma's. State Water Quality Standards are intended to accompany EPA's technology-based standards, so as to prevent harmful cumulative effects from discharges. "Water Quality Standards are retained as a supplementary basis for effluent limitations * * * so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 n.12 (1976).

While the Clean Water Act establishes minimum requirements for water pollution control, Congress enacted Section 510 to preserve a state's right to establish water quality standards that are more stringent than the federal minimum requirements. 33 U.S.C. § 1370. These Senators are interested in ensuring that Oklahoma's rights to establish and enforce water quality standards are protected. One of the fundamental policies of the Clean Water Act involves protecting the primary responsibilities and rights of the states to control and eliminate water pollution and "to plan the development and use * * * of land and water resources." Section 101. Unless Oklahoma and other states are protected now, they will be forced to accept the lowest common denominator of upstream States' water quality standards.

In the early 1980's the City of Fayetteville, Arkansas, operated a sewage treatment plant that violated Arkansas' water quality standards. At that time the plant discharged all its waste into the White River, which is not an Illinois River tributary. In order to stop violating its own water quality standards, Arkansas built a new treatment plant. This plant reduced discharge pollutants, but half of the treated effluent was then put into an Illinois River tributary, violating Oklahoma's water quality standards.

Oklahoma Water Quality Standards (OWQS) provide special protection for the Upper Illinois River by designating it an Oklahoma Scenic River. This designation preserves the river through "beneficial use limitations." This federally-approved standard plainly prohibits any "new point source discharge of wastes" which would result in "water quality degradation." OWQS §§ 5, 3. The Tenth Circuit has applied the plain meaning of Oklahoma's standard. It is clear from the face of the standard that no degradation is allowed.

In enacting the Clean Water Act, Congress entrusted to EPA the important task of analyzing the issues in-

volved in granting NPDES permits. In order to issue a permit authorizing discharges into an interstate waterway, EPA must determine that the permit will meet the Clean Water Act's requirements, including compliance with federally approved water quality standards of the downstream state. Well-established rules of administrative interpretation require the EPA to carry out this function in a reasonable manner. In this case, the EPA has unreasonably avoided the plain meaning of Oklahoma's standards which require no water quality degradation.

These Senators again urge the Court to uphold the Tenth Circuit's decision, and thereby assure affected states of their right to enforce federally approved water quality standards as intended by Congress. Oklahoma's standards cannot and should not be compromised. The Court is urged to rule in favor of Oklahoma to prevent further degradation of the beautiful and scenic Illinois River.

SUMMARY OF THE ARGUMENT

The Court of Appeals' unanimous opinion affirmed EPA's interpretation of the Clean Water Act as requiring application of the federally approved Water Quality Standards of any affected downstream state as well as the standards of the State where a discharge occurs. The Tenth Circuit also reversed EPA's final decision to issue the permit, labeling it a misinterpretation and misapplication of two important Oklahoma water quality regulations and an arbitrary disregard for certain expert testimony. In addition, the Court found that EPA's interpretation of Oklahoma's water quality regulations were contrary to EPA's historical interpretation of the Clean Water Act. The Court held that on its face, the language of Oklahoma's Water Quality Standards is clear and that EPA's decision to issue the permit contravened the plain meaning of the OWQS as well as the requirements of the Clean Water Act.

The Court of Appeals' decision raises two issues: whether Oklahoma's Water Quality Standards apply to a permit for an Arkansas facility, and whether the Court of Appeals properly interpreted the OWQS and applied them to the facts of this case. EPA agrees with Oklahoma and the Tenth Circuit that the federally approved water quality standards of an affected downstream state must be applied to a permit issued to an upstream facility. Therefore, this particular holding of the Court of Appeals is only disputed by Arkansas. On the other hand, the finding that EPA misinterpreted Oklahoma's federally approved water quality standards is disputed by both Arkansas and EPA.

With the enactment of the Clean Water Act, Congress supplanted state and federal common law with federal legislation. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (Milwaukee II). Thus, federal law, as embodied in the Clean Water Act, governs the complex issues raised in interstate water pollution disputes. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (Milwaukee I); *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Under this Act, before a permit authorizing discharges into interstate waterways may issue, EPA must determine that the proposed permit will meet all applicable requirements of the Act and implementing regulations, including compliance with federally approved water quality standards of an affected state. In determining whether or not a proposed permit is in compliance with federally approved water quality standards of an affected state, EPA must look at the plain language of the state statute. If it is clear on its face, EPA must apply that standard without resort to interpretation. *United States v. Oregon*, 336 U.S. 646, 648 (1961).

In this case, EPA correctly concluded that the permit must comply with OWQS, but incorrectly interpreted the plain meaning of the federally approved state standards.

As a result, the Court of Appeals was well within its authority when it reversed EPA's decision to issue the permit and found that EPA had misinterpreted and misapplied Oklahoma's water quality standards.

ARGUMENT

I. THE PROVISIONS OF THE CLEAN WATER ACT CLEARLY REQUIRE COMPLIANCE WITH THE FEDERALLY APPROVED WATER QUALITY STANDARDS OF AN AFFECTED STATE IN INTERSTATE WATER QUALITY DISPUTES.

The Clean Water Act was adopted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. § 1251(a). The primary mechanism for achieving the goals of the Clean Water Act was the establishment of the NPDES permit program. Section 301(a), 33 U.S.C. § 1311(a). The Act provides for permits to be issued either by EPA or by a state which has been granted permitting authority. Section 402, 33 U.S.C. § 1342. Regardless of who issues the permit, the permit must contain effluent limitations established to ensure compliance with the Act's technology-based and water quality-based requirements. Effluent limitations control the type, quantity, rate, and concentration of effluent that can be discharged. § 502(11), 33 U.S.C. § 1362(11). Technology-based limitations are established based on the degree of effluent control which can be achieved by point sources using various levels of pollution control technology. §§ 301, 304, 33 U.S.C. §§ 1311, 1314. *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 126-36 (1977). Water quality-based limitations impose more stringent limitations in order to ensure that the particular designated uses of a waterbody will be protected and maintained.

In the Clean Water Act, Congress recognized that technology-based limitations alone were not sufficient to protect water quality. Therefore, Congress enacted Section 301(b)(1)(C) of the Act, which further requires that all permits ensure compliance with "any more stringent limitation, including those necessary to meet water quality standards," developed by the states and approved by EPA pursuant to Section 303, 33 U.S.C. § 1313, and other state water related laws or regulations. Section 303 water quality standards consist of the designated use of the waterbody (*e.g.*, agriculture, drinking water supply, fish and wildlife management, recreation) and the water quality criteria established to attain and maintain such uses. See *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1489 (9th Cir. 1987). Unlike technology-based standards, water quality standards are not developed based on an evaluation of the capability of pollution control technologies available to dischargers, but rather on the physical attributes of a stream necessary to support the designated use. See generally § 303(c)(2), 33 U.S.C. § 1313(c)(2), and 40 C.F.R. 131.10(g). Thus, once water quality standards have been set under Section 303 of the Act, § 301(b)(1)(C) requires that permit limits be established to assure compliance with the standards without exception.

A. The Plain Language Of The Clean Water Act Does Require That Affected States' Federally Approved Water Quality Standards Be Applied to Permits For Upstream State Facilities.

The decision of the Court of Appeals gave the unambiguous language of the Clean Water Act its plain meaning. The Court held that:

> "[based on its plain language * * * we agree with EPA that the purpose of [§ 401(a)(2), 33 U.S.C. § 1341(a)(2), requiring 'compliance with applicable water quality standards'] must be to enable affected states to ensure that their water quality will not be jeopardized by a discharge in another state. Only a strained interpretation of the statute could produce the result Arkansas seeks—that 'applicable water

quality requirements' refers to the WQS of only the source state." *Oklahoma v. EPA*, 908 F.2d 595, 610 (10th Cir. 1990).

Arkansas argues that provisions of the Clean Water Act do not require compliance with the standards of downstream states. (Brief of Petitioners at page 13). Arkansas alleges that § 402(b)(5) is the controlling provision for resolving interstate water disputes whether the source state or EPA is the permitting authority. Here, however, EPA is the permit-issuing authority, so EPA is directly responsible for determining whether a proposed permit will meet all applicable requirements of the Act and implementing regulations (§ 402(a)).

Although Section 402(b)(5) is pertinent to resolving interstate water disputes when the source state is the permitting authority, Section 401(a)(2) is particularly relevant when EPA is the permitting authority. This section states:

> (2) * * * Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. * * * Such agency * * * *shall* condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency *shall not* issue such license or permit. (Emphasis added.)

This section *requires* a license or permit to contain any necessary conditions to ensure compliance with the applicable water quality standards of an affected state. It does not make compliance with affected states' water quality standards discretionary, it makes compliance mandatory. This requirement is emphasized in EPA regulations. 40 C.F.R. 122.44 forbids issuance of a permit unless applicable water quality standards of "all affected states" are complied with by all upstream discharges. In addition, Section 505(h) of the Clean Water Act gives a State the right to sue to enforce effluent limitations on an out-of-state discharger which are necessary to prevent violations of its water quality standards. This section would not be needed if a permit may be issued which does not protect the affected state's water quality.

Arkansas relies on the "permissive" language contained in Section 402(b)(5) for the argument that the Clean Water Act requires permitting agencies to "consider the standards of downstream states, but does not require the automatic application of those standards." (Brief of Petitioners at page 13.) This section however, does not specifically address water quality standards of downstream states. Rather, it requires that a source state notify any *affected* state of the permit application and give such state the opportunity to submit written *recommendations* with respect to the permit application. Arkansas argues that neither this provision nor any other section of the Act, imposes an affirmative obligation on the state permitting agency to accept the downstream state's recommendations. (Brief of Petitioners at page 14).

Although a source state may not be required to accept an affected state's *recommendations*, Congress by statute clearly required the source state to certify that the permit would not violate any applicable water quality requirements including those of an affected state. § 401(a)(1) & (2). Thus, a source state may have the discretion not to accept the recommendations of an affected state, but it *must* ensure compliance with such state's federally approved water quality standards.

Any other reading of the statute would undermine the stated purpose and congressional intent of the Act to restore and maintain the Nation's waters and "to recognize, preserve, and protect the primary responsibilities and

rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources and to consult with the Administrator in the exercise of his authority under this Act." Section 101(a) & (b).

B. Failure To Apply An Affected State's Federally Approved Water Quality Standards To A Permit On An Upstream Facility Would Allow An Upstream State To Discriminate Against An Affected Downstream State.

If an affected state's federally approved water quality standards were deemed not to apply to a permit for an upstream facility, then an upstream state could seriously hinder the attainment of an affected state's water quality goals. This could also impact an affected state's industrial development choices. If an upstream state has more lenient water quality standards, then pollutants from discharges upstream will affect the water quality of the affected states interfering significantly with those states' achievement of their water quality goals which Congress expressly sought to "recognize, preserve and protect". Section 101(b).

Those who seek to overturn the Court of Appeals' decision in this case argue that imposition of affected states' federally approved water quality standards on an upstream state would allow downstream states to discriminate against upstream states by enacting unnecessarily stringent standards. This argument ignores the fact that the same argument can easily be made in the reverse. If upstream states are allowed to ignore the federally approved water quality standards of a downstream state, an upstream state could enact more lenient standards thereby enticing industry away from the downstream state by using the lure of fewer restrictions on discharges.

The failure to impose an affected state's more stringent standards on an upstream state is detrimental to the

goals and purposes of the Clean Water Act. The failure to apply an affected state's standards will allow for more pollutants to be discharged versus Congress' stated goal of the elimination of discharge of pollutants into navigable waters. Section 101(a)(1). This position also ignores the fact that EPA must approve a state's water quality standards. If EPA found that a state's standards were unduly discriminatory against upstream discharges, they could deny approval.

The instant case is a prime example of an upstream state discriminating against a downstream state. The facts in this case (See Brief for EPA at pages 6 & 7) disclose that in the early 1980's the City of Fayetteville, Arkansas, operated a sewage treatment plant that discharged all of its wastewater into the White River (which is not a tributary of the Illinois River). The White River was unable to assimilate that waste without violating Arkansas' water quality standards. To alleviate this situation, Fayetteville constructed a new wastewater treatment plant, *with federal financial assistance provided by EPA* under the Clean Water Act. Thus, EPA has a vested interest in getting this plant into operation. The plant was designed so that discharges into the White River would not cause a violation of Arkansas water quality standards because half of the treated effluent was to be discharged into a tributary of the Illinois River.

EPA issued a NPDES permit for the Fayetteville treatment plant on November 5, 1985. The permit contained a reopener provision specifying that if an ongoing study of water quality in the Illinois River showed a need for more stringent limitations on Fayetteville's discharge to ensure compliance with Oklahoma water quality standards, the permit would be modified accordingly.[2]

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[2] The joint study, conducted by scientists from both Oklahoma and Arkansas, was commenced over four years ago using funding from EPA. Although the study has been completed, EPA will not release

Following various administrative appeals by both Oklahoma and Arkansas, EPA upheld its decision to issue a permit to the Fayetteville plant. The sewage plant has been in operation and discharging its effluents since the permit was finally approved by EPA in December 1988.

The facts show that Arkansas made the deliberate decision to divert discharge of its wastewater from an intrastate river into a tributary of the Illinois River 39 miles upstream from the Oklahoma boundary. Oklahoma has designated the Illinois River, from where the Illinois River enters Oklahoma from Arkansas until it reaches Lake Tenkiller Reservoir, as a "Scenic River" and has prohibited any degradation in this portion of the river and prohibited any new point source discharge of wastes. *See*, the 1982 Oklahoma Water Quality Standards, as adopted by the Oklahoma Water Resources Board and approved by EPA under Clean Water Act § 303(c). Thus, Oklahoma has made its intentions clear that this portion of the Illinois River constitutes an outstanding resource of exceptional recreational or ecological significance.

Furthermore, Oklahoma is not the only entity which acknowledges the unique beauty of the Illinois River. Congress has designated the upper Illinois as a potential addition to the National Wild and Scenic Rivers System. The Illinois River is listed as (40) in Section 1276 of Title 16 of the United States Code which enumerates rivers constituting potential additions to the national wild and scenic rivers system. Obviously, the Illinois River possesses the necessary physical qualities to gain federal and Oklahoma attention. When the Oklahoma legislature designated the Illinois River a scenic river, they found the river "possessed such natural scenic

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the findings because Arkansas has refused to sign off on the study. Arkansas will not sign off on the study's findings because of a dispute over whether data collected from Lake Tenkiller, which is fed by the Upper Illinois River, should be included. This data shows that the Lake is dead below the first four feet.

beauty and wildlife and recreational values that it would be preserved for the benefit of the people of Oklahoma."

These same attributes are valued by the congressional policy behind the federal National Wild and Scenic Rivers System. Congress intended this program for rivers which possess "remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values * * *." 16 U.S.C. § 1271. These characteristics clearly describe the Illinois River, the only river in Oklahoma which Congress has recognized as possessing the qualities necessary to be added to the list of potential designees.[3]

Thus, in issuing the permit to the Fayetteville plant, EPA allowed Arkansas to totally disregard congressional intent and the protections Oklahoma has sought to place on this valuable resource. Arkansas took this action to protect its own waterway from further degradation, thus imposing its wastewater upon Oklahoma. To resolve its wastewater problems, Arkansas made the Illinois River the receiver of its waste. Such a result was never intended by Congress and, in fact, expressly prohibited in Sections 301(a) & (b), 401(a)(1) & (2), and 402(a).

II. THE COURT OF APPEALS CORRECTLY HELD THAT EPA HAD MISINTERPRETED AND MISAPPLIED OKLAHOMA'S WATER QUALITY STANDARDS.

The Court of Appeals' unanimous opinion affirmed EPA's interpretation of the Clean Water Act as requiring application of the federally approved Water Quality Standards of any affected downstream state but went on to reverse EPA's final decision as flawed by misinterpretation and misapplication of Oklahoma's water quality regulations. The Tenth Circuit found the plain language of Oklahoma's regulations to be clear and EPA's decision to issue the permit arbitrary and capricious. *Oklahoma*

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[3] Final designation of the Illinois River as a federal Wild & Scenic River is pending before the Department of the Interior.

v. EPA, 908 F.2d 595, 616 (10th Cir. 1990). The Court should affirm the Court of Appeal's decision.

In its decision, the Court of Appeals rejected EPA's interpretation of the OWQS as protecting only against actual measurable injury to the River specifically traceable to the Fayetteville discharge:

> "[W]e believe the plain language of the regulations manifests a clear intent to allow no degradation of the water quality of scenic rivers. More specifically, the regulations disallow any additional discharge of pollution (either a new point source or an increase from an existing source) to a scenic river if its water quality *has been degraded* or if the new source *would degrade* it." (*Id.* at 617, 618).
>
> "* * * We conclude the requirements of the Beneficial Use Limitations/Anti-Degradation Policy are violated when the water quality of a scenic river [such as the Upper Illinois] undergoes any human-caused, detectable change. By 'detectable change' we mean any detectable change in a water quality parameter such as turbidity or phosphorus * * *. We do *not* mean a detectable change that violates a numeric criterion for that parameter * * *, which criterion would otherwise apply if the Beneficial Use Limitations were not applicable (i.e., if the receiving waters were not designated as a scenic river or otherwise as '(a)' in [OWQS] Appendix A)." (*Id.* at 618).

The Court of Appeals also rejected the contention that an inability to detect the Fayetteville effluent's "individual impact on Illinois River water quality" would suffice to satisfy the OWQS, explaining that:

> "If we were to accept this logic, once water quality standards in a stream were violated, additional new discharges might be permitted indefinitely so long as each one would have an unmeasurable individual impact. The absurdity of such a policy is manifest." (*Id.* at 632).

Therefore, the Court of Appeal's rejected EPA's interpretation of the OWQS which merely required that the incremental impact of a proposed additional discharge

must itself be detectable. The Court of Appeals held instead that a permit may not be issued to a source if a body of water is already experiencing water quality standard violations and a proposed new source would discharge the same pollutants to which those standards apply. Under this interpretation of the governing Oklahoma Standards, the Tenth Circuit found no reason for remanding to the permitting authority for any further proceedings.

A. Oklahoma Water Quality Standards Clearly State That No Degradation Shall Be Allowed In High Quality Waters Such As The Illinois River.

Once a State's Water Quality Standards have been approved by EPA under § 303, 33 U.S.C. § 1313, they have the force of federal law. Neither the state adopting those standards nor a permitting agency (whether it be a state agency or EPA) has authority to deviate from those standards or excuse noncompliance with them in issuing an NPDES permit. See *EPA v. California ex rel. State Water Resources Control Board*, *supra*, 426 U.S. at 220; *City of Sarasota v. EPA*, 813 F.2d 1106, 1109 n.10 (11th Cir. 1987).

The Oklahoma Standards applicable to this case were adopted and approved by EPA in 1982. The OWQS provide special protection for the Upper Illinois River by designating it as an Oklahoma Scenic River and as subject to special "beneficial use limitations." Thus, the Upper Illinois River is protected by a federally approved and enforceable standard categorically prohibiting any "new point source discharge of wastes" which would result in "water quality degradation." OWQS §§ 5, 3.

Section 1 of the 1982 OWQS provides that the purpose of the standards is to assure that degradation of existing quality of waters in the state does not occur. Section 3, the antidegradation policy, requires that "no degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance." High quality waters

include water bodies designated as "Scenic Rivers" in Appendix A of OWQS. Section 5 provides that any body of water designated as (a) in Appendix A (such as the Upper Illinois River) "are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source. . . ."

The meaning of these sections are plain and unambiguous; no degradation of high quality waters is allowed. It does not state that degradation may occur as long as it is undetectable or unmeasurable in each individual application. The OWQS plainly and clearly require that not an iota of degradation may occur.

The Court of Appeals determined, based on the record, that it was undisputed that the water quality of the Upper Illinois River is already degraded under the criteria of the OWQS by excessive nutrients and turbidity. The court also found that the record showed, without contradiction, that substantial amounts of phosphorous, nitrogen and other organic pollutants put into the water by the Fayetteville plant would remain after the River entered Oklahoma.

Considering the unrefuted evidence contained in the record and noted by the Court of Appeals, that the discharge from the Fayetteville plant is contributing to further degradation of the Illinois River, neither EPA nor the State of Arkansas should be allowed to issue a permit for additional discharges into the Illinois River under the requirements of the Clean Water Act. EPA's attempt to weaken Oklahoma's Standards through a strained and inappropriate interpretation of Oklahoma's water quality requirements cannot and should not be allowed to stand.

B. Even If Oklahoma's Water Quality Standards Were Not Clearly Unambiguous, EPA's Interpretation Was Plainly Erroneous.

EPA argues that its interpretation of the Oklahoma Water Quality Standards should be accorded deference.

(Brief of EPA at page 20). In support of this proposition, EPA refers this Court to cases which hold that a reviewing court should defer to an agency's reasonable interpretation of a regulation it is charged with administering. However, EPA goes on to state that to the extent that the terms of a federally approved state standard are ambiguous or silent on a particular point at issue in an interstate dispute, EPA's interpretation of the standard should be followed "unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. at 872 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). As stated in the preceding section, Oklahoma's standards are neither ambiguous nor silent on the point at issue. The Oklahoma Standards are clear on their face. Therefore, there is no need for interpretation by EPA. *United States v. Bowen*, 100 U.S. 508, 513-514 (1879); *United States v. Oregon*, 336 U.S. 643 (1961).

Assuming, *arguendo*, that Oklahoma's Standards were not clear and thus were subject to interpretation, EPA's interpretation was erroneous. EPA tries to support its interpretation of Oklahoma's standards by stating that Oklahoma's standards are based on the EPA model water quality standards set out at 40 C.F.R. Pt. 131. Thus, EPA alleges that "it is surely reasonable and appropriate for EPA to construe the state standard as being consistent with the model provision." (Brief of EPA at page 20, note 25). Oklahoma's antidegradation provision (§ 3) provides:

> *No degradation* shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. (Emphasis added.)

The corresponding language in EPA's model antidegradation regulations in effect until 1983 (40 C.F.R. 35.1550(e)(2) (1981)):

> Additionally, no degradation shall be allowed in high quality waters which constitute an outstanding National resource, such as waters * * * of exceptional recreational or ecological significance.

Although the Oklahoma standard and EPA's model standard are very similar, EPA has subsequently modified this section of their model standards to allow for temporary degradation associated with construction projects. (Brief of EPA at page 23, note 27.) If EPA's previous interpretation of the original language had allowed for *any* degradation in high quality waters (such as the degradation that EPA's interpretation of the OWQS allows), then there would have been no need for EPA to modify this provision to allow for temporary degradation. Therefore, EPA had to modify its own standard to allow for *some* degradation, which strongly implies that its interpretation of the earlier language did not allow for *any* degradation. This supports Oklahoma's assertion that the correct interpretation of Oklahoma's Standards is that they do not allow for *any* degradation. To interpret Oklahoma's Standards to allow for some degradation is clearly erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed and the NPDES permit issued to Fayetteville municipal treatment plant modified to prohibit discharges of its effluent into the Illinois River basin.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

(20) (4)

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BRIEF OF THE CHEROKEE NATION OF OKLAHOMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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July 22, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1262

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

No. 90-1266

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE CHEROKEE NATION OF OKLAHOMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The Cherokee Nation of Oklahoma respectfully submits this brief as *amicus curiae* in support of respondents State of Oklahoma, *et al.*, and urges this Court to affirm the decision of the United States Court of Appeals for the Tenth Circuit in *Oklahoma v. Environmental Protection Agency*, 908 F.2d 595 (10th Cir. 1990).

INTEREST OF THE AMICUS CURIAE

The Cherokee Nation of Oklahoma is America's second largest Indian Tribe. Many of its 125,000 members have lived in northeastern Oklahoma for over 150 years. The Illinois River in Oklahoma runs through this portion of the state.

Many tribal members use the river today for fishing and recreational purposes. The Tribe is committed to protection and preservation of the environment, including maintenance of the highest water quality of the Illinois River, for present and future generations.

SUMMARY OF ARGUMENT

The decision of the Tenth Circuit in this case must be affirmed to fully acknowledge and fulfill the rigorous and uniform federal water pollution enforcement structure embodied in the Clean Water Act. The Tenth Circuit properly determined that the terms of upstream effluent discharge permits must ensure compliance with the water quality standards of all affected downstream states.

The "zero discharge" goal embodied in the Clean Water Act is an organizing paradigm around which the Act's enforcement is structured. Through this policy objective, Congress envisioned ongoing improvement in the quality of the nation's water through the delicate and critical interplay between effluent discharge limitations and water quality standards. The plain language, legislative history and regulations pertaining to the effiuent discharge and water quality standard provisions confirm the propriety of the Tenth Circuit's interpretation of the Act and decision in this case.

Congress did not intend the enforcement policies and mechanisms under the Act to operate in isolation of or, worse yet, in contradition to one another. A reversal of the Tenth Circuit's decision would, however, produce results at odds with the goals and enforcement structure

of the Act. The Clean Water Act's mandate to ensure a uniform and rigorous system of pollution control dovetails harmoniously under Oklahoma's interpretation of the Act. A decision in favor of Arkansas in this case would completely undermine the broad policy goals and enforcement structure of the Act and would be tantamount to ignoring Congress' demonstrated intent to establish a rigorous and uniform federal system of water pollution control and reduction. The Clean Water Act's noble and necessary objective must not be reduced to empty rhetoric.

ARGUMENT

I. THE TENTH CIRCUIT PROPERLY DETERMINED THAT THE TERMS OF EFFLUENT DISCHARGE PERMITS IN UPSTREAM STATES MUST COMPLY WITH THE WATER QUALITY STANDARDS OF ALL AFFECTED DOWNSTREAM STATES TO FULFILL THE RIGOROUS POLLUTION CONTROL MANDATE OF THE CLEAN WATER ACT

> Our Nation's waters are in crisis. Congress established a goal that by 1985, we would achieve *zero discharge* of all pollutants into our rivers, lakes, and coastal waters.[1] Yet, billions of pounds of toxic and other pollutants continue to reach the nation's waters each year. The result of this pollution-contaminated seafood, beach closings, unsafe drinking water, diseased and disappearing wildlife—threatens our public health and our economy.

Natural Resources Defense Council, *A Citizens' Campaign for Clean Water*, 9 *Newsline* 3 (July 1991) (emphasis in original).

This case presents an important opportunity for this Court to fully acknowledge and fulfill the rigorous pollution reduction objective of the Clean Water Act. This Court can do so by upholding the decision of the Tenth Circuit in this matter. More specifically, this Court can

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[1] *See* Clean Water Act § 101(a)(1), 33 U.S.C. § 1251(a)(1).

send a clear message to the states that the zero discharge policy and correspondingly uniform federal enforcement structure of the Clean Water Act unequivocally *mandate* that effluent discharge permits in upstream states strictly comply with the water quality standards of all affected downstream states.

In considering the arguments in this case, it is important to note that this case does not turn upon issues relating to traditional notions of federalism, state sovereignty, or interstate commerce. As properly framed by the Tenth Circuit in the proceedings below, this case presents a narrow question of statutory interpretation:

> [W]hether *federal* law embodied in the Clean Water Act requires a discharge permit to ensure compliance with the applicable water quality standards of all affected states. Traditional concepts of state powers and the § 1370 savings clause cannot provide the answer to that question. We must look to the Clean Water Act as a whole.

Oklahoma v. Environmental Protection Agency (hereinafter "*Okla. v. EPA*"), 908 F.2d 595, 606 n.9 (10th Cir. 1990) (emphasis in original).

Indeed, upon examination of the Clean Water Act *as a whole*, the plain language, legislative history, and regulations of the water quality and effluent discharge permit provisions of the Act demonstrate the wisdom and necessity of the Tenth Circuit's decision in this case.

A. The Plain Language Of The Clean Water Act Provisions Pertaining To Water Quality Standards And Effluent Discharge Limitations Evinces A Strict Regulatory System Which Demands Vigilant Compliance To Ensure Ongoing Improvement In The Quality Of The Nation's Waters

In enacting the 1972 and 1977 amendments to the Federal Water Pollution Control Act (hereinafter "Clean Water Act" or "CWA"), Congress envisioned and established an aggressive regulatory program to drastically reduce and ultimately eliminate the discharge of pollutants into the waters of the United States. Rather than assessing the relative costs and benefits of water pollution control, the Clean Water Act has recognized and mandated that clean water must be considered a necessary and worthwhile goal in itself. *See* Gould, *Regulation of Point Source Pollution under the Federal Water Pollution Control Act*, in *Water Quality Administration* 87 (B. Lamb ed. 1980).

An examination of the operative enforcement mechanisms under the Clean Water Act supports the Tenth Circuit's interpretation of the Act and its decision in this case. In section 101(a) of the Act, Congress declared that its guiding objective in the administration of the Act's provisions is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In accordance with this policy objective, Congress further declared in section 301(a) that the discharge of any pollutant by any person is unlawful unless pursuant to a permit under the provisions of the Act. 33 U.S.C. § 1311(a). Pursuant to the directive embodied in section 301(a), Congress established a strict federal regulatory system which employs a delicate interplay between federal-state water quality standards and source-by-source, technology-based effluent discharge restrictions (NPDES permits) to prevent the degradation of the nation's waters. 33 U.S.C. §§ 1312, 1313; 1342. All of the aforementioned provisions underscore Congress' intent to establish a more rigorous and comprehensive scheme of federal water pollution control and reduction in the Clean Water Act.

Several provisions of the CWA relate more directly to the interstate water pollution issue at stake in this case and its connection with the enforcement structure and pollution reduction goals of the Act. Specifically, sections 301 and 402, when read together, mandate that any efflu-

ent discharge (NPDES) permit in an upstream state must ensure compliance with the water quality standards of all affected downstream states. Section 301, which prohibits the discharge of any pollutant except pursuant to the section 402 or section 404 permit requirements, provides in section 301(b)(1)(C):

> In order to carry out the objective of this chapter [i.e., to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251] there shall be achieved . . . not later than July 1, 1977, *any more stringent limitation, including those necessary to meet water quality standards*, . . . established pursuant to *any* state law or regulations (under authority preserved by section 1370 of this title) . . . or required to implement *any* applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1311(b)(1)(C), *incorporated in Okla. v. EPA*, 908 F.2d at 604-05 (emphasis added), *citing* Brief for Respondent at 16, *Oklahoma v. Environmental Protection Agency*, 908 F.2d 595 (10th Cir. 1990) (Nos. 89-9503, 89-9507, and 89-9516) (hereinafter "*EPA Brief*").

In conjunction with section 301, section 402 further commands that "any NPDES permits issued under the Act contain terms adequate to ensure compliance with all requirements of section 301." Sections 402(a)(2) and (b)(1)(A); 33 U.S.C. §§ 1342(a)(2) and (b)(1)(A); *EPA Brief* at 16.[2] In addition to the mandatory language of sections 301 and 402, the EPA regulations issued pursuant to section 402 further confirm Oklahoma's interpretation of the interplay between water quality standards and NPDES permits. "No permit may be issued: . . . (d) When the imposition of conditions cannot insure compliance with the *applicable water quality requirements of all affected States.*" 40 C.F.R. § 122.4(d) (1990) (emphasis added).

[2] "Thus, these sections are not merely timing provisions, as Arkansas asserts (citation omitted), but establish fundamental requirements of the Act." *Id. See, e.g., Environmental Protection Agency v. State Water Resources Bd.*, 426 U.S. 200, 205 n.12 (1976).

Section 401 provides additional support for Oklahoma's position. Section 401(a) establishes that no permit may be granted for federal government discharge activities "until a certification has been obtained from the state in which the discharge originates finding that the discharge will comply with, among other things, the [state's] section 301 water quality requirements." Section 401(a)(1), 33 U.S.C. § 1341(a)(1); *EPA Brief* at 17. More importantly, Congress demonstrated its concern for the water quality of potentially affected downstream states in these circumstances by providing a notice requirement in section 401(a)(2)[3] "to ensure that such permits also comply with the water quality standards of non-source, non-certifying states." *Id.* Therefore, consistent with Oklahoma's position, "the purpose of the [section 401(a)(2)] notice requirement is to enable a state whose water qualities may be affected by the proposed federal activity an opportunity to insure that its standards will be complied with." *Lake Erie Alliance for the Protection of the Coastal Corridor v. United States Army Corps of Engineers*, 526 F. Supp. 1063, 1075 (W.D. Pa. 1981), *aff'd without opinion*, 707 F.2d 1392 (3d Cir. 1983), *cert.*

[3] Section 401(a)(2) provides:

> Whenever such a discharge may affect, as determined by the [EPA] Administrator, the quality of the waters of any other State, the Administrator . . . shall so notify such other state. . . . If . . . such other State determines that such discharge will affect the quality of its waters so as to violate any water requirement in such State, . . . [The licensing and permitting] agency, based upon the recommendations of such State, . . . shall condition such license or permit in such a manner as may be *necessary to ensure compliance with applicable water quality requirements*. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

33 U.S.C. § 1341(a)(2) (emphasis added).

denied, 464 U.S. 915 (1983); *see also United States v. Puerto Rico*, 721 F.2d 832, 833-34 (1st Cir. 1983) (certification is a "condition precedent to the EPA's issuance of a NPDES permit"), *incorporated in Okla. v. EPA* at 610.

Oklahoma's position gains further support from EPA's upset regulations. Again, the delicate interplay between technology-based effluent discharge permits and water quality standards is determinative. In this regard, EPA has declared that while technology-based effluent limitations may be exceeded under certain narrowly-tailored circumstances [4], water quality-based standards *must be met at all times.* 49 Fed. Reg. 37,998, 38,038 (1984), *quoted in Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1489 (9th Cir. 1987), *judgment vacated*, 485 U.S. 931 (1988). EPA rejected an industry proposal to permit the assertion of an upset defense for violation of water quality standards because of the impracticality of having permittees conduct monitoring on *all stream segments that may be affected* to ensure that water quality standards were not violated. 49 Fed. Reg. at 38,038 (emphasis added), *quoted in Okla. v. EPA* at 613. Therefore, as enunciated in the Tenth Circuit's decision, EPA's rejection of the industry proposal reaffirms the Act's unequivocal mandate that the terms of effluent discharge permits in upstream states must strictly comply with the water quality standards of all affected downstream states.

B. The Legislative History Of The Act Confirms Congress' Intent To Require Upstream States To Comply With The Water Quality Standards Of Downstream States

It is a well-established principle of statutory construction that when the meaning of statutory language is clear on its face, the courts need not resort to legislative history

[4] For instance, failure of pollution control equipment may be sufficient for an industry to successfully assert the defense. *See* 40 C.F.R. § 122.41(n) (1990).

to ascertain congressional intent. *See, e.g., United States v. Oregon*, 366 U.S. 643, 648 (1961). Nevertheless, should this Court find the meaning of the statutory language to be ambiguous, the legislative history of the applicable statutory provisions of the CWA in this case reinforces Congress' demonstrated intent to require upstream states to comply with the water quality standards of downstream states.

In restructuring the Clean Water Act with the 1972 and 1977 amendments to the Act, Congress sought to rectify the problems it perceived with the efficacy of enforcement under the earlier versions of the Act. Congress determined in the CWA that there was a pressing need for a more aggressive and comprehensive system of water pollution control.[5] "A key reason for Congress' restructuring of the mechanism for water pollution control in 1972 was its recognition that 'water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source.'" *EPA Brief* at 20 (citing 2 Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972* (hereinafter *1972 Leg. Hist.*) 1495 (Comm. Print 1973) (Rep. of Sen. Comm. on Pub. Works on S. 2770). Accordingly, Congress established a technology-based effiuent discharge permit system under section 402 to operate in conjunction with the water quality standard system to ensure more

[5] "Unlike its predecessor program [FWPCA] which permitted the discharge of a certain amount of pollutants . . ., this legislation [CWA] would clearly establish that no one has the right to pollute—that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes." S. Rep. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3709. *See also* Van Putten & Jackson, *The Dilution of the Clean Water Act*, 19 J. L. Reform 863, 867 (1986) ("Diluting wastes by discharging them into the nation's waters was viewed as an acceptable method of disposal, at least up to some point of acceptable water quality degradation").

efficient control and reduction of pollution in the nation's waters.

During hearing on the 1972 amendments to the Act, EPA Administrator Ruckelshaus expressed his understanding of how the newly-established interaction between water quality standards and effluent limitations was intended to operate:

> Water quality standards need to be strengthened and expanded to cover all waters—interstate and intrastate. They also need to be achieved. Effluent limitations are a means for achievement. They should not become an end in themselves, nor should they be defined in statutory law solely in terms of the technology needed to achieve them.

Water Pollution Control Legislation, 1972: Hearings on H.R. 11896 before the House Comm. on Public Works, 92d Cong., 1st Sess. 290 (statement of William D. Ruckelshaus, Administrator, EPA), *reprinted in* 2 *1972 Leg. Hist.* at 1188, *incorporated in EPA Brief* at 21 n.17.

Ruckelshaus' views are reinforced by other comments in the legislative history regarding the duties of dischargers to meet water quality standards.

> If there are a multitude of point sources on a given stretch of water, the potential of exceeding the water quality standards exists, even though each point source is meeting best practicable control technology. If 'best practicable control technology' . . . is inadequate to meet the water quality standards, . . . *each point source* shall be required to meet effluent limitations which would be consistent with the applicable water quality standards.

118 Cong. Rec. 33755 (1972) (remarks of Rep. Harsha) (emphasis added), *incorporated in EPA Brief* at 22.

Therefore, the legislative history elucidates and confirms Oklahoma's interpretation of the interplay between effluent limitations and water quality standards. The

documented concern in the legislative history regarding the protection of both intrastate and interstate waters through simultaneous compliance with effluent discharge permits *and* applicable water quality standards is critical. It reinforces the plain meaning of the applicable CWA statutory provisions: effluent discharge permits in upstream states must assure compliance with the water quality standards of the source state as well as the water quality standards of affected downstream states. Any other reading would directly contravene Congress' goals in establishing effluent limitations as a complementary enforcement tool to ensure ongoing improvement in the quality of *all* states' waters.

II. THE TENTH CIRCUIT'S DECISION IS CONSISTENT WITH AND FURTHERS CONGRESS' UNIFORM FEDERAL REGULATORY SCHEME UNDER THE CLEAN WATER ACT IN WHICH CONGRESS INTENDED THAT STATES REGULATE IN A MANNER WHICH OPTIMIZES WATER POLLUTION REDUCTION AND PREVENTION, IRRESPECTIVE OF GEO-POLITICAL BOUNDARIES

In the Clean Water Act's policy directive under section 101(a) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," Congress' reference to the "nation's waters" refers to nothing more than the sum total of the waters of the fifty states. 33 U.S.C. § 1251(a). As such, if the states do not regulate the waters *within their borders* in a manner consistent with the goals and enforcement structure of the Act, the quality of the "nation's waters" is jeopardized.

The Clean Water Act made ineffective state water pollution control a federal concern. Accordingly, Congress established a more uniform and comprehensive scheme of federal administration of water pollution control in the CWA which appropriately divested the states of their exclusive and largely ineffective regulation of water pol-

lution within their borders prior to the 1972 Act.[6] To fulfill the federal water pollution reduction policy under the Act, Congress envisioned a regulatory system devoid of geo-political lines[7] to enhance the quality of the nation's waters and remedy the inadequacies of the state-by-state approach to water pollution control. The relationship between the federal and state enforcement roles under the CWA must be considered in light of the foregoing goals and concerns.

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[6] *See* Collins, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. Envtl. Aff. L. Rev. 295, 336-37 (1984). The first federal legislative standards for water pollution control were water quality-based standards in the 1965 amendments to the Federal Water Pollution Control Act. "[T]he decentralized water scheme in the [1965] FWPCA relied primarily upon the states to regulate pollution problems. The lack of nationally uniform water quality standards, the tendency for states not to actively regulate their own discharges, and the resulting interstate competition for industry at the expense of pollution controls contributed to the continual downgrading of water quality standards. For all of these reasons, under the FWPCA water quality standards alone were conceptually unsound to deal with the diverse, mobile problems of modern pollution." *Id.* (citing S. Rep. No. 414, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3674).

[7] "We are dealing here with a federal law which, although recognizing individual states' rights to control pollution within their borders, intended to set up a relatively uniform framework for dealing with water pollution of the waters of the United States *irrespective of geo-political boundaries.*" *In the Matter of NPDES Permit for the City of Fayetteville, Ark.*, NPDES No. AR0020010, Order on Motion (1987) (Yost, ALJ) (hereinafter "*ALJ Order on Motions*") at 5 (emphasis added). *See also EPA Brief* at 23 ("Congress' concerning regarding uniformity are satisfied where water quality standards apply to NPDES permits based upon the impact of a discharge, *rather than upon the artificial construct of a state line*") (emphasis added).

A. The Plain Language Of The Clean Water Act Provisions Pertaining To Federal And State Responsibilities Under The Act Demonstrates The Primacy Of The Federal Role Through The Act's System Of Federal Oversight, Whereby Congress Sought To Ensure That The States Adequately Fulfill The Act's Federal Pollution Reduction Objective

Congress has unequivocally acknowledged and supported the important role that states play in the implementation and enforcement of the CWA. In section 101 (b) of the Act, Congress declared: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution." The regulatory rights and responsibilities of states under the Act cannot be understood in isolation of the Act's enforcement structure and policy, however. In this regard, Congress established a uniform regulatory structure whereby the states are entitled to regulate under the Act, but only in a manner which does not undermine or jeopardize the attainment of the federal water pollution reduction objective under the Act.

This uniform regulatory system in the CWA requiring strict federal supervision of state implementation is most clearly evident in section 402, the NPDES permit system. 33 U.S.C. § 1342. Under section 402(b), a state must first be authorized by EPA to exercise permit issuing authority over sources within its borders. Once approved, the terms of effluent discharge permits issued pursuant to approved state programs must at all times be consistent with minimum federal requirements. *See also* § 510, 33 U.S.C. § 1370 ("[a] state . . . may not adopt or enforce any . . . effluent limitation . . . less stringent than the . . . standard of performance under this chapter"). Thus, the CWA establishes initial and ongoing federal oversight of approved state programs.

The EPA's supervisory powers are certainly not limited to passive oversight of state programs. In fact, Congress

authorized the EPA to specifically restrict and/or revoke states' authority to administer a state NPDES permit program. For instance, EPA may revoke a state's authority to administer a state NPDES program "if the state fails to administer the program in accordance with the requirements of the Act." Section 402(c)(3), 33 U.S.C. § 1342(c)(3), *incorporated in EPA Brief* at 18 n.12. Moreover, EPA is empowered to block the issuance of a state NPDES permit[8] on the grounds that either: "(1) the permitting state failed to accept recommendations from another state whose waters may be affected by issuance of the permit; or (2) the permit is outside [i.e., inconsistent with] the guidelines and requirements of the Act." Section 402(d)(2), 33 U.S.C. § 1342(d)(2), *Id.* at 18-19.

This system of strict and ongoing federal oversight in the CWA is critical in determining the outcome of this case for essentially two reasons. First, because the state enforcement role under the Act is circumscribed in relation to the nature and scope of the federal regulatory role, the Tenth Circuit's decision must be upheld to ensure that the states attain compliance with the strict and overriding federal pollution reduction objective. Second, allowing an upstream state to degrade the water quality of a downstream state through the issuance of effluent permits in the source state could effectively discourage and preclude compliant downstream states from taking initiative in the nationwide effort to reduce the pollution of the nation's waters, as Congress envisioned in section

[8] In dicta, the D.C. Circuit expressed its support for the "permit blocking" power of the EPA to also apply to downstream states whose water quality will be affected by an NPDES permit in an upstream state. "A state whose water quality will be affected by the issuance of a permit for discharge in another state may block that permit until conditions are imposed insuring compliance with applicable water quality requirements of the objecting state." *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 594 n.21 (D.C. Cir. 1980).

101(b) of the Act.[9] 33 U.S.C. § 1251(b). Accordingly, the Tenth Circuit's decision must be upheld to avoid making a mockery of the Act's worthy and necessary pollution reduction policy and correspondingly uniform federal enforcement structure.

B. Allowing Upstream States To Issue Effluent Discharge Permits Which Do Not Strictly Comply With The Water Quality Standards Of All Affected Downstream States Would Foster An Antagonistic And Piecemeal Regulatory System In Contravention Of The Cooperative And Uniform Pollution Reduction Structure Under the Act

Congress understood that the use of effluent limitations as a means of regulation without regard for *all* affected downstream water quality (both within and outside of the source state) would undermine the aggressive and uniform regulatory scheme of the Act. *See, e.g.*, S. Rep. 370, 95th Cong., 1st Sess. at 73, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4398 ("The committee is concerned that the Agency is not conducting a vigorous overview of state programs to assure *uniformity and consistency of permit requirements and of the enforcement of violations of permit conditions.*") emphasis added). Accordingly, Congress sought to establish and foster a uniform and cooperative regulatory scheme to reduce both intrastate and interstate water pollution.

Congress' uniformity objective is most clearly evident in section 103 of the Clean Water Act, entitled "Interstate Cooperation and Uniform Laws." 33 U.S.C. § 1253. In this section, Congress declared:

[9] This interpretation does not establish a system whereby an affected state can demand an additional layer of permit compliance under the Act from the permitting state. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) ("An affected state may not establish a separate permit system to regulate an out-of-state source"). Instead, the source state permit must merely "incorporate terms sufficient to assure compliance with the affected state's water quality standards." *EPA Brief* at 20-21, n.15.

> The Administrator shall encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution, encourage the enactment of improved and, so far as practicable, uniform state laws relating to the prevention, reduction, and elimination of pollution; and encourage compacts between States for the prevention and control of pollution.

Section 103(a), 33 U.S.C. § 1253(a).

This section is significant for the purposes of the instant case for a variety of reasons. First and foremost, Congress expressly considered the issue of interstate water pollution in this section and did so in the context of seeking to encourage and sustain *uniformity and cooperation* in the enforcement of the Act's provisions. Second, the use of interstate compacts is merely encouraged in the interest of cooperation and uniformity but is not mandated as the only method through which the Act considers interstate water pollution. In other words, Congress' inclusion of this provision does not in any way undermine the propriety of the Tenth Circuit's holding regarding the interstate water pollution issue in this case.

Although Congress acknowledged in section 103(a) that the goal of uniformity among states should be fostered "so far as practicable," this language does not envision granting upstream states the opportunity to degrade the water quality of downstream states under certain circumstances. Instead this language merely reflects Congress' recognition of the need to foster more cooperation among states' water pollution control activities at all times. Moreover, in section 505(h), Congress provided an avenue for recourse in the event of conflicting water pollution control objectives between and among states. 33 U.S.C. § 1365(h). Section 505(h) preserves a downstream state's ability to assert its right to ensure full enforcement of its water quality standards, unimpeded by the effects of effluent permits in upstream

states.[10] Therefore, section 505(h) is an additional enforcement mechanism which, in conjunction with section 103, is designed to ensure that the national goal of uniform pollution reduction as administered by the states is not undermined.

The Tenth Circuit's decision is consistent with the Act's uniform enforcement mandate and should be affirmed in order to avoid potentially adverse policy ramifications in contravention of the Act's objectives. Of primary concern is the potential for "pollution shopping" on the part of industry if this Court were to overturn the Tenth Circuit's decision. More specifically, if NPDES permitees in upstream states are not required to ensure that their discharges will not degrade the water quality standards of downstream states, states will then be permitted to compete to entice indusry to operate in their state by offering to industry the "temptation" of lax water pollution controls. Congress expressly considered and was concerned about this problem of "industries moving from state to state in search of less strict pollution standards. . . . We must establish national effluent limitations to prevent industrial 'shopping. . . .'" 1 *1972 Leg. Hist.* at 517 (House debate on H.R. 11896) (statement of Rep. Harrington).

As a corrollary to the introduction of "pollution shopping," reversal of the Tenth Circuit's decision would also create "pollution havens" and promote antagonistic, rather than cooperative, activity between and among states in the area of water pollution control. Such an outcome would exalt economic and political considerations over the unequivocal pollution reduction goals and structure of the Act. Moreover, in addition to directly under-

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[10] Section 505(h) "authorizes a state to bring an action against the Administrator for failure to enforce an effluent standard or limitation, the violation of which is occurring in another state but which causes a violation of any state water quality requirement in the affected state." *EPA Brief* at 19, n.14.

mining the spirit of uniformity and cooperation among states embodied in section 103, the very concept of "pollution havens" is directly at odds with Congress' intent in enacting the Clean Water Act and its amendments considered as a whole.[11]

In addition to the foregoing adverse ramifications, a reversal of the Tenth Circuit's decision would promote inequitable treatment of complaint downstream states under the Act. "If the permit terms of an upstream discharger need not take account of impacts in a downstream state, achievement of downstream standards would be impossible in many circumstances or would be possible in others only by imposing a disproportionate burden on dischargers located in the downstream state." *EPA Brief* at 21. Moreover, the Tenth Circuit's decision must be upheld to guard against the absurd and inequitable consequences which would flow from Arkansas' construction of the Act pursuant to which "persons living on one side of a state line would somehow have superior rights to persons living on the same river 100 yards away, but in another state." *ALJ Order on Motions* at 5. Congress certainly did not intend to foster such a random and inconsistent application of the Act's pollution reduction mandate.

To overturn the decision of the Tenth Circuit in this case would be tantamount to ignoring the irrefutable truth that water moves in hydrological cycles and that

---

[11] "Setting more stringent standards is consistent with the general balance between clean water imperatives and economic considerations implicit throughout the Act . . . the Act does not purport to reach its goals by applying cost-benefit-alternative analysis. *Economic and political constraints are not established as key factors in setting pollution control standards.*" Collins, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. Envtl. Aff. L. Rev. at 340. *See also* S. Rep. No. 414, *supra*, note 5 ("pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes").

many waters form or cross the borders of two or more states. In order to preserve and fulfill the fundamental pollution reduction objective and uniform enforcement structure of the Clean Water Act, the decision of the Tenth Circuit must be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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July 22, 1991

(21) (20)

Nos. 90-1262 and 90-1266

Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

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v.

STATE OF OKLAHOMA, *et al.*,

Respondents.

ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

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BRIEF OF THE STATES OF ILLINOIS, TENNESSEE, ALABAMA, ARIZONA, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, MAINE, MICHIGAN, MISSISSIPPI, NEW JERSEY AND SOUTH CAROLINA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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On Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF ILLINOIS, TENNESSEE, ALABAMA, ARIZONA, CALIFORNIA, CONNECTICUT, FLORIDA, MAINE AND NEW JERSEY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

The States of Illinois, Tennessee, Alabama, Arizona, California, Connecticut, Florida, Maine and New Jersey respectfully submit this brief as *amici curiae* in support of respondent and urge this Court to affirm the decision by the United States Court of Appeals for the Tenth Circuit, in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990) on the

primary issue in this case, the applicability of a downstream State's standards.[1]

INTEREST OF THE AMICI CURIAE

In the vernacular of this litigation, the *Amici* States are both "upstream States" and "downstream States", having navigable waters that originate within their boundaries, waters that enter and pass through their boundaries, and waters that serve as boundaries. The *Amici* States include States which, pursuant to the statute at issue in this litigation, commonly known as the Clean Water Act, 33 U.S.C. 1251-1387, have been delegated authority to issue National Pollutant Discharge Elimination System ("NPDES") permits and thereby regulate and control discharges into their waters. The *Amici* States also include States which have not been delegated NPDES authority. The *Amici* States have also promulgated water quality standards approved by the United States Environmental Protection Agency ("U.S. EPA") for the waters within their boundaries. Under both State and NPDES programs, the *Amici* States regulate municipal dischargers (such as those represented by signatories to the *amici curiae* brief of the Association of Metropolitan Sewage Agencies, *et al.*) and industrial dischargers (similar to the signatories to the *amici curiae* brief of Champion International Corporation, *et al.*).

[1] This brief is submitted on behalf of the *Amici* States by their respective Attorneys General. Pursuant to Supreme Court Rule 37.5, the consent of the parties to the filing of this brief is not required.

Further, the State of Tennessee is party to an ongoing NPDES permit proceeding before U.S. EPA concerning *amicus* Champion International Corporation's Canton, North Carolina, papermill, located on the Pigeon River, an interstate stream which flows into Tennessee. In that proceeding, U.S. EPA has issued an NPDES permit which it determined to be protective of Tennessee's water quality standards. That permit is being challenged by Champion International Corporation in proceedings pending before the U.S. EPA Administrator. Champion International Corporation has also challenged the applicability of Tennessee's water quality standards in a petition for review filed in the U.S. Court of Appeals for the Fourth Circuit. *Champion Int'l Corp. v. EPA*, No. 91-2302 (4th Cir. pet. filed Jan. 3, 1991).

The *Amici* States are vitally interested in this case because a reversal of the Tenth Circuit's decision would totally undermine efforts by any State possessed of interstate waters to establish water quality within its boundaries at levels above the federal minimum standards established pursuant to the Clean Water Act. The stated goals of the Clean Water Act include establishing a Federal-State partnership in combating water pollution and recognizing, preserving and protecting the primary responsibilities and rights of the States to control and eliminate water pollution and "to plan the development and use * * * of land and water resources." (Section 101). One of the means for implementing these goals is section 303's provision for encouraging States to improve their water quality through the passage of their own water quality standards.

Under the interpretation of the Clean Water Act advocated by the Arkansas petitioners and supporting *amici* (and rejected by both the U.S. EPA and the Tenth Circuit), this goal of encouraging individual States to take the lead in determining what uses would be made of the waters within their boundaries and in improving water quality as needed to allow such uses would go unfulfilled. If an upstream State could authorize a discharge which would exceed a downstream State's stricter water quality standards in the latter State's waters then the downstream State would have to choose between eliminating, or severely restricting, any discharges within its boundaries in order to maintain its selected uses and enhanced water quality or abandoning those higher uses and its stricter water quality standards. Such a choice would inevitably lead to a progressive lowering of State water quality standards to levels at or near the federally-mandated minimum standards rather than advancing the Clean Water Act's goal of progressively cleaner water as a result of State initiatives. Such a system would result in a *de facto* abdication to the U.S. EPA of each State's leading role under the Clean Water Act in determining the uses of its waters and enhancing its own water quality. States would upgrade their water quality only when the U.S. EPA deemed it appropriate and made every State do so in order to avoid inflicting a disproportionate burden upon dischargers within their boundaries. Instead of being equal partners in the effort against water pollution, downstream States would quickly become "silenced" partners, no longer willing to invest any further effort or resources in enhancing water quality.

The Tenth Circuit's affirmance of U.S. EPA's determination that the NPDES permit for a discharge in an upstream State must be conditioned so as to attain compliance with a downstream State's stricter water quality standard, where that stricter water quality standard has been reviewed by U.S. EPA and approved as an "applicable water quality standard" pursuant to Section 303(c) of the Clean Water Act, more than adequately balances the interests of the upstream and the downstream State. It alone fulfills the goals of the Clean Water Act and makes upstream and downstream States equal partners.

If upstream dischargers are not enlisted in the effort to assure compliance with a downstream State's enhanced water quality standards through an across-the-board application of a U.S. EPA-approved water quality standard, then downstream dischargers will have to become involved in upstream permit proceedings in order to protect their current discharge levels. This would only make the permit proceeding more cumbersome. Leaving the accommodation of a downstream State's water quality interests to the unfettered discretion of the permitting authority, as the Arkansas petitioners advocate, is fraught with the potential for inciting economic warfare between States. In one permit great weight may be given to the downstream State's desired water uses (and correlating higher water quality standards) while in another permit the discharger's desire to provide as little treatment as possible may run roughshod over the downstream State's choice of water uses. Requiring a discharger whose effluent would affect water quality downstream to comply with the downstream State's federally-approved standards assures a more uniform

accommodation of both upstream and downstream interests than the crazy quilt resulting from different permitting agencies exercising unbridled discretion on a case-by-case basis. The haphazard nature of such an unwieldy system is further aggravated by the fact that this *ad hoc* balancing would have to be repeated every five years as permits are renewed.

The *Amici* States supporting the Oklahoma respondents do so because of their interest in having a system that promotes uniformity in balancing upstream and downstream interests and which encourages rather than punishes those States which seek to enhance water quality within their own boundaries. For all these reasons, the *Amici* States have a compelling interest in this case and respectfully urge this Court to affirm the decision of the Tenth Circuit.

SUMMARY OF THE ARGUMENT

The interpretation of the Clean Water Act reflected in the Tenth Circuit's decision represents a proper balancing of the goals and purposes of the Clean Water Act, principles of State sovereignty, the requirements of the Commerce Clause, and principles of statutory interpretation. A reversal of that decision would allow one State to undermine the legislative and policy choices of other States as well as prompting abdication by the States to the federal government of their primary responsibilities to determine the uses of waters within their boundaries and to protect public health and welfare and the environment.

The Tenth Circuit's decision reflects a reasonable interpretation of the Clean Water Act which alone fulfills the expressed purposes and goals of the statute. Under that decision an upstream State will regulate the dischargers within its boundaries while still maintaining the integrity of the downstream State's desired water uses and quality.

ARGUMENT

This case turns on the question of whether a discharger in an upstream State may be allowed to undermine the entire system of water uses, water quality standards, and effluent limitations established by a downstream State and approved by U.S. EPA. Answering this question primarily involves an issue of statutory interpretation with implications for State Sovereignty and the Commerce Clause. The *Amici* States support the interpretation of the Clean Water Act employed by U.S. EPA and the Tenth Circuit because it preserves State sovereignty by maintaining each State's right to establish the uses and quality of the waters within its boundaries while retaining each State's authority to control the dischargers under its jurisdiction. The *Amici* States submit this brief in order to strongly urge this Court to affirm the decision of the Tenth Circuit.

I. THE TENTH CIRCUIT'S DECISION COMPLIES WITH THIS COURT'S GUIDELINES ON STATUTORY INTERPRETATION.

When measured against guidelines established by this Court on statutory interpretation, it is clear that the Tenth Circuit's determination that under the Clean Water Act, a discharger in an upstream State must demonstrate compliance with the stricter water quality standards of a downstream State in order to obtain an NPDES permit is the proper interpretation of the Clean Water Act. Applying those same guidelines to the interpretation of the Clean Water Act pressed by the Arkansas petitioners demonstrates the inadequacy of their interpretation.

In this case, the U.S. EPA construed the Clean Water Act to require a discharger in an upstream State whose effluent will affect water quality in a downstream State to demonstrate compliance with the stricter water quality standards of the downstream State in order to obtain an NPDES permit. Accordingly, the standards for statutory construction enunciated by this Court in the case of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), apply and were properly employed by the Tenth Circuit –

> "Determining the extent of EPA's authority under the Clean Water Act is a question of law that we review *de novo*. 'Our first inquiry is whether "Congress has directly spoken to the precise question at issue. If the intent of congress is clear that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."' *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059, 1065 (10th Cir. 1987) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694 (1984), rev'd on other grounds, 486 U.S. 204, 108 S.Ct. 1765, 100 L.Ed.2d 238 (1988)). However, where the statute is ambiguous, EPA's construction, as that of an agency charged with administering the statute, is entitled to substantial deference. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). If EPA's interpretation of the Clean Water Act is reasonable, we should not disturb it unless it 'is contrary to the policies Congress sought to implement in enacting the statute.' 813 F.2d at 1965; *see also* 467 U.S. at 845, 104 S.Ct. at 2783." (908 F.2d at 599, 604).

In the proceedings below, both U.S. EPA and the Oklahoma parties asserted that the inquiry could end with the first prong of *Chevron* urging the Clean Water Act's manifestation of intent on this issue to be clear. The *Amici* States would echo that assertion at this level. The Tenth Circuit, however, went on to apply the second prong of *Chevron* and upheld the U.S. EPA's interpretation of the Clean Water Act, finding it to be "reasonable and consistent with Congress' purposes in enacting the CWA" (908 F.2d at 604).

This inquiry must start with the purposes of the Clean Water Act. Section 101 clearly and succinctly states those purposes. In particular, Section 101(b) states that:

> "[I]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement of land and water resources * * * ."

The uses of water resources are, of course, dependent upon the quality of that water. Recreational uses, public

water supply uses, irrigation uses and other uses all require water of a certain quality. If the water is not of that quality, it cannot be used for such purposes. Thus, without the ability to assure that its waters are of a certain quality, a State cannot assure the use of that water for purposes it has chosen. Without that ability the congressional purpose expressed in Section 101(b) will go unfulfilled.

U.S. EPA's interpretation of the Clean Water Act and the affirmation of that interpretation by the Tenth Circuit are grounded in fulfilling the purposes expressed above as well as in giving meaning to the language of Sections 301, 303, and 401 of the Clean Water Act. Section 301 of the Clean Water Act calls for compliance with water quality standards established by any State. Section 303 provides for the review and approval of State water quality standards by U.S. EPA and, once approved, the State water quality standard becomes the "water quality standard for the applicable waters of that State". As an "applicable water quality standard", the State standard must be complied within order for a permit to be issued pursuant to Section 401. Section 401 requires issuance of a certification by the source State that all requirements of the Clean Water Act will be met before a federal license or permit could be issued. These requirements are fleshed out further by regulations promulgated by U.S. EPA. 40 C.F.R. 122.4 prohibits issuance of a permit unless compliance with the applicable water quality requirements of "all affected States" is demonstrated. 40 C.F.R. 122.44(d)(4) makes a similar prohibition. Section 510 precludes any interpretation of the Clean Water Act which would impair a State's authority over waters within its

boundaries. Finally, Section 505(h) of the Clean Water Act allows a State to sue to enforce effluent limitations on an out-of-state discharger necessary to prevent violations of the State's water quality standards. If a permit may be issued in an upstream State which does not protect the downstream State's water quality, this provision is meaningless.

When viewed as a whole, all of these provisions drive home the point that the Clean Water Act was intended to require an upstream discharger to comply with a downstream State's stricter water quality standards. Such an interpretation is clearly in keeping with the purposes of the Clean Water Act. Section 101 states that the objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's Waters" and that the policy of Congress is "to recognize, preserve, and protect the primary responsibilities and rights of States" to combat water pollution.

To counter this compelling interpretation of the Clean Water Act, the Arkansas petitioners single out a solitary procedural provision of the statute – Subsection 402(b)(5). That provision requires a State issuing an NPDES permit to provide an opportunity to submit recommendations on the permit to those States "whose waters may be affected by the issuance of the permit". According to the Arkansas petitioners, this provision places downstream States solely in an "advisory capacity", Arkansas petitioner's brief, at 18, citing *International Paper Company v. Ouelette*, 479 U.S. 481, 490-91 (1987), and leaves upstream States free to ignore impacts on a downstream States's water quality.

This provision is more readily reconciled with the language and expressed purposes of the entire Clean

Water Act and the substantive requirements of Sections 505(h), 402(b)(1)(A) and 301 (which require compliance with all "applicable water quality standards") if Section 402(b)(5) is viewed as a procedural requirement. Thus, Section 402(b)(5) would provide the affected state with the means for participating in the determination of *how* the mandate of compliance with its water quality standards will be fulfilled (rather than just being allowed to comment on *whether* its water quality should be protected). This interpretation retains the authority of the source State to determine the details of *how* the discharger would be regulated so as to assure downstream water quality standards would be met while preserving the downstream State's right to establish water quality conditions and uses within its boundaries.

Such an interpretation also avoids undermining the Clean Water Act's efforts to establish minimum water quality standards nationwide. Section 303 authorizes U.S. EPA to establish water quality standards where those established by a State are not consistent with the applicable requirements of the Clean Water Act. Once promulgated, those standards become the applicable water quality standards for the affected waters of that State. Under the Arkansas petitioners' interpretation of 402(b)(5), a permitting State would be totally free to disregard such standards in making its permit decision. Such a result would not be in keeping with the spirit and purpose of the Clean Water Act but would be unavoidable if the Arkansas petitioners' interpretation of 402(b)(5) is accepted.

In essence, the Arkansas petitioners advocate that downstream State standards approved pursuant to the

Clean Water Act have no bearing on a permit-issuing State's establishment of permit terms and conditions, on U.S. EPA's review of a State-issued permit, or upon U.S. EPA's issuance of a permit. Thus, the permitting authority may ignore the downstream State's standards and may do so for any reason or no reason at all. If, as the Arkansas petitioners advocate, the Clean Water Act allows the upstream State to ignore a downstream State's standards, a permit which did so would not be "outside the guidelines and requirements" of the Clean Water Act, regardless of the degree of deterioration of water quality it may cause downstream. Without the applicability of such standards, the Clean Water Act's goal of uniformity would be quickly undermined.

The potential for creating such a lack of uniformity was a primary factor in this Court's decision to reject the application of a downstream State's public nuisance laws to an upstream State discharger in *Ouellette, supra,* 479 U.S. at 496. The congressional goal of " 'clear and identifiable' discharge standards", *id.* at 496 would not be met under the Arkansas petitioners' interpretation. Under that interpretation, two adjacent facilities with similar discharges could be subjected to different effluent limits if the source State elected to protect the downstream State's water quality in one permit while opting to forego such protection in the second permit. Downstream State discharge standards would no longer be clear and identifiable since they would be subject to change when a new upstream discharger's effluent resulted in a deterioration of the downstream State's water quality.

The same result would occur in those instances where a downstream State had adopted water quality

standards meeting the minimum standards established by U.S. EPA rather than stricter standards. Under the Arkansas petitioners' interpretation, a source State would be free to ignore those standards as well. In instances where the water in the downstream State was at the minimum standard, the upstream State could authorize a new discharge which would result in an exceedance of that standard in the downstream State.

Because there are no limits circumscribing a State's discretion to ignore downstream State standards under the interpretation advocated by the Arkansas petitioners, that interpretation creates the potential for an upstream State to use discharge limits as a tool to drive business and industry out of a downstream State and into an upstream State. Discharge limits may be set at levels which would force tightening of downstream State discharge limits in order to maintain compliance with the downstream State's water quality standards. The less stringent upstream effluent limits would soon become very attractive to a downstream State discharger.

If, however, the downstream State's role is found to be one of assisting in the determination of how to attain compliance with its water quality standards, these pitfalls would be avoided. Under such a construction the permitting State would retain the authority to regulate dischargers within its boundaries while still maintaining the integrity of the downstream State's water quality. The permitting State would determine what effluent limits, permit conditions or other measures, were necessary to protect the downstream State's water quality. This discretion would be circumscribed by the requirement that the

discharge must still comply with the downstream State's standards.

Since the only water quality standards which would receive such treatment are those which U.S. EPA had approved, the Clean Water Act's goal of providing efficiency and predictability is met. *Ouellette, supra*, 479 U.S. at 496. Identifying such U.S. EPA-approved standards would be easily done. Unlike common-law standards which were preempted in *Ouellette*, upstream States could have input into the setting of the downstream State's water quality standards by participation in that State's rulemaking process and when they are submitted to U.S. EPA for review and approval.

This interpretation would also place U.S. EPA in the role of arbitrating technical disputes rather than disputes over conflicting State policy/legislative choices, a role usually reserved for this Court. As the Arkansas petitioners concede, under Section 402(d)(2) of the Clean Water Act U.S. EPA could veto a permit if it is "outside the guidelines and requirements" of the Clean Water Act. Thus, instead of being forced to determine whether the upstream State's reasons for ignoring a downstream State's water quality standards were sufficiently consistent with the Clean Water Act's "guidelines and requirements" to pass muster (without any standards to guide such a determination) U.S. EPA would only be required to determine whether the downstream State's standards are being met. If they are not met, the permit would be "outside the guidelines and requirements" of the Clean Water Act.

If U.S. EPA, as the permitting or reviewing agency, could authorize a permit which disregarded a downstream State's water quality standards, U.S. EPA would be doing indirectly what it has said it cannot do directly – reject a State standard as too stringent. As the Arkansas petitioners have noted, brief p. 25, U.S. EPA has interpreted the "savings clause" of Section 510 of the Clean Water Act to preclude it from disapproving a State's adoption of more stringent water quality standards and adopting a less stringent standard. *See, e.g.*, 54 Fed. Reg. 39,099 (1989) and *Homestake Mining Co. v. EPA*, 477 F.Supp. 1279, 1284 (D.S.D. 1979). Nonetheless, if U.S. EPA decides not to require compliance by an upstream discharger with a downstream State's stricter water quality standard, it will, in essence, be overruling the downstream State's stricter standard. Such a decision will either lead to the revocation of the stricter standard or the creation of an area where the stricter standard is not met. Such a result is clearly contrary to the Clean Water Act.

Judicial review at the State and federal levels would be enhanced if a court's inquiry focused on whether permit conditions adequately protected water quality than if the inquiry dealt with whether the appropriate choice was made between competing State policy/legislative choices. Evidence is much easier to adduce and review on technical issues than on policy issues.

In this light, it is clear that the Tenth Circuit's and U.S. EPA's interpretation of the Clean Water Act was reasonable and consistent with the purposes and intent of that statute. This determination is reinforced even further when considerations of State sovereignty and the Commerce Clause are factored in. As the water quality

received from the upstream State deteriorates, dischargers in the downstream State would be subjected to increasingly stringent standards in order to achieve the water quality desired by the downstream State. As effluent limitations became more stringent, the cost of compliance increases as well. There may be instances where the only way to maintain the desired downstream water quality will be to entirely eliminate discharges in the downstream State. When faced with such an impact, States may well relax their water quality standards in order to avoid that impact. That result is contrary to the goals and purposes of the Clean Water Act.

II. REQUIRING AN UPSTREAM STATE DISCHARGER TO COMPLY WITH A DOWNSTREAM STATE'S WATER QUALITY STANDARDS DOES NOT CONTRAVENE THE COMMERCE CLAUSE.

Because Congress explicitly called upon the States to develop their own stricter water quality standards and to submit them for U.S. EPA review and approval, requiring upstream States to assure that their dischargers will not violate those standards does not offend the Commerce Clause. Accordingly, any Commerce Clause "implications" cannot serve as a basis for overruling the Tenth Circuit.

"When Congress so chooses, State actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985). See also *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 653-654 (1981). In this case, Section 303 of the Clean Water

Act plainly preserved the authority of each State to promulgate its own water quality standards for the waters within its boundaries. Section 303 and other provisions of the Clean Water Act, including Sections 101(b) and 510, encourage States to enact water quality standards stricter than of the minimum requirements of the Clean Water Act in order to fulfill the statutes stated objective of restoring and maintaining the integrity of the nation's waters. The stricter State standards at issue in this case are not merely the result of a reservation of States' rights. Instead, there is an express authorization of stricter State water quality standards which precludes any assertion that the Commerce Clause preempts those standards and forecloses their application against out-of-state sources.

Furthermore, it is a matter of hornbook law that "Congress can enact legislation prescribing that the federal pollution standard in each state shall be the same as the State standard." J. Nowak, R. Rotunda, and J. Young, Constitutional Law, at 249 (1978). The Clean Water Act's designation of a U.S. EPA-approved State water quality standard as the "applicable water quality standard" represents a congressional incorporation by reference of a State standard as the standard that must be complied with for the waters within that State. See also *United States v. Sharpnack*, 355 U.S. 286, 294 (1958). In that case the Court affirmed Congress' adoption of State criminal statutes as the standard for federal enclaves.

Finally,

> "The commerce clause is not a guaranty or the right to import into a state whatever one may please, absent a prohibition of Congress, regardless of the effects of the importation upon the local community."

Robertson v. California, 328 U.S. 440, 458 (1946). *See also, Maine v. Taylor*, 477 U.S. 131, 148 fn. 19 (1986). A downstream State's water quality standards reflect its determination of the amount of wastes that can be dumped into its waters without curtailing its selected uses. Furthermore, the Oklahoma regulations at issue herein were promulgated in response to the congressional call for stricter State standards and approved by U.S. EPA. Requiring an out-of-state discharger to comply with those standards does not offend the Commerce Clause.

III. THE TENTH CIRCUIT'S DECISION PRESERVES THE SOVEREIGNTY OF UPSTREAM AND DOWNSTREAM STATES RATHER THAN SACRIFICING ONE FOR THE OTHER.

The Clean Water Act's requirement that an upstream State discharger comply with a downstream State's water quality standards represents a mechanism for resolving concerns of neighboring States rather than a mechanism by which one State's policy choices can undercut those of another. Adopting the interpretation of the Clean Water Act put forward by the Arkansas petitioners would allow one State to undermine another State's policy and, in essence, to determine how entities in another State would be regulated.

As the Tenth Circuit noted (908 F.2d at 602), if an upstream State discharger is not obligated to comply with a downstream State's water quality standards, the upstream State will dictate what the water quality and

water uses will actually be in the downstream State. Thus, there is only one interpretation of the Clean Water Act offered in this case that would result in one State's policy (as expressed in terms of water quality) being imposed upon another State and that is the interpretation proffered by the Arkansas petitioners. If the permitting authority in an upstream State need not assure that a discharger must comply with a downstream State's water quality standard then the downstream State must impose more stringent effluent limitations on the dischargers within its boundaries in order to preserve its desired water quality and water uses. Thus, the downstream State will have water quality and water uses determined by the upstream State.

If, however, the discharger in the upstream State must comply with the downstream State's stricter water quality standards, the upstream State's water quality will be at least as good as that State's standards and the downstream State's water quality and water uses will be preserved. This result would also be in keeping with the purpose and objective of the Clean Water Act to enhance water quality throughout the nation.

This interpretation of the Clean Water Act would not offend constitutional principles by allowing one State to "directly" control activities in another State. *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43 (1982). The permitting agency (either U.S. EPA or the source State) would be the one who would regulate the discharger by identifying and imposing those permit conditions necessary to protect downstream State water quality. The downstream State's role would be similar to that of the permit applicant

during the permit process – a party to the permit proceeding with a vested interest at stake and to whom a right of appeal is accorded. Unlike the permit applicant, however, the downstream State's interest would be an entitlement which had to be protected before the permit could issue. In the case of a downstream State, the appeal is made to the U.S. EPA pursuant to Section 402(d) of the Clean Water Act rather than to the permitting State's appellate tribunal. Such an interpretation maintains the "subordinate positions" of downstream States as described by this Court in *dicta* in *Ouellette, supra*, 479 U.S. at 491, while still according the protection to the downstream State's water quality standards established by Congress. This interpretation is further reinforced by Section 505(h) of the Clean Water Act. Pursuant to Section 505(h) a downstream State could bring suit against the administrator to enforce NPDES permit effluent limits when its water standards were violated. This authority would be meaningless if a permit could be issued with effluent limits that would result in water quality violations.

If the upstream discharger can disregard the downstream State's water quality standards then the downstream State is placed between Scylla and Charybdis – between lowering its water quality standards or driving its dischargers out of State with drastic effluent limitations. When faced with such a choice, States will abdicate to the federal government their primary responsibilities and rights to reduce and eliminate pollution and to determine water quality and water uses within their boundaries. Because any State's voluntary efforts to enhance water quality would be undercut by an upstream State

with lower water quality, each State would wait for U.S. EPA to establish new, universal water quality standards. Such a result is clearly contrary to the purposes and objectives of the Clean Water Act and principles of State sovereignty.

In this light, it is clear that only reversal of the Tenth Circuit's decision will have adverse implications on State sovereignty. These implications strongly counsel against accepting the Arkansas petitioners' interpretation of the Clean Water Act and in favor of affirming the Tenth Circuit.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully urge the Court to affirm the decision of the Tenth Circuit Court of Appeals respecting downstream States' standards and preserving the proper balance between upstream and downstream States.

Respectfully submitted,

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(22) (21)

Nos. 90-1262, 90-1266

Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

STATE OF ARKANSAS, et al.,

Petitioners,

v.

STATE OF OKLAHOMA, et al.,

Respondents.

ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

STATE OF OKLAHOMA, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF SIERRA CLUB, and *AMICUS CURIAE* BRIEF OF SIERRA CLUB, IN SUPPORT OF RESPONDENTS.

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Nos. 90-1262, 90-1266

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF SIERRA CLUB, IN SUPPORT OF RESPONDENTS.

Sierra Club hereby respectfully moves this Court, pursuant to Supreme Court Rule 37.4, for leave to file the attached Amicus Curiae Brief of Sierra Club in Support of Respondents.

The grounds for this motion are twofold. First, Sierra Club and its more than 630,000 members have a vital interest in protecting and enhancing the quality of the

nation's waterways. Sierra Club members, through organizational outings as well as individual activities, regularly use and enjoy for recreational, aesthetic and scientific purposes, thousands of lakes, rivers, streams and marine waters throughout this country, including the Illinois River in Arkansas and Oklahoma. The ruling below properly enforces the Clean Water Act's proscription against violation of federally-approved water quality standards for such waters. Second, the Sierra Club's counsel, the Sierra Club Legal Defense Fund, has expertise in the Clean Water Act and its regulations which can assist this Court in the disposition of this matter. The Legal Defense Fund has successfully prosecuted numerous citizen enforcement suits against violations of the Clean Water Act during the last decade, including *Sierra Club v. Union Oil Co.*, 813 F.2d 1480 (9th Cir. 1987), judgment vacated, 485 U.S. 931, 108 S.Ct. 1102, 99 L.Ed. 2d 264 (1988), judgment amended and reinstated, 853 F.2d 667 (9th Cir. 1988); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987); and *Sierra Club v. Electronic Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990).

In accordance with Supreme Court Rule 37.3, by letter dated June 28, 1991 Sierra Club requested petitioners State of Arkansas and the Environmental Protection Agency to consent to the filing of Sierra Club's proposed *amicus curiae* brief. As of this date, petitioner Environmental Protection Agency and petitioner State of Arkansas have consented to the filing.

For the foregoing reasons, Sierra Club moves this Court for leave to file the attached *Amicus Curiae* Brief of Sierra Club in Support of Respondents.

Date: July 19, 1991 Respectfully submitted,

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AMICUS CURIAE BRIEF OF SIERRA CLUB, IN SUPPORT OF RESPONDENTS.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Sierra Club is a non-profit corporation organized and existing under the laws of the State of California, and has its principal place of business at 730 Polk Street, San Francisco, California 94109. The Sierra Club is a national conservation organization comprising over 630,000 members.

The objectives of the Sierra Club include the conservation, protection and sound management of natural resources, and the preservation and enhancement of our environment. The stated corporate purposes of the Sierra Club are:

> To enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general; to explore, enjoy, and preserve the scenic resources of the United States and its forests, waters, wildlife and wilderness; to undertake and to publish scientific, literary, and educational studies concerning them; to educate the people with regard to the national and state forests, parks, monuments, and other natural resources of especial scenic beauty and to enlist public interest and cooperation in protecting them.

The Sierra Club's concerns encompass the wise utilization and protection of the navigable waters of the United States. Members of the Sierra Club regularly use and enjoy these water resources, including the Illinois River which is the subject of this action, for fishing, boating, camping, swimming, photography, nature study and other forms of recreational, scientific and spiritual activity.

The Sierra Club's vital interest in this case stems from its long-standing and continuing efforts to assure proper interpretation and enforcement of the Clean Water Act. The Sierra Club has successfully prosecuted numerous citizen suits to enforce the effluent limitations and water quality standards of the Act where the Environmental Protection Agency and state water pollution control agencies have failed to do so, including *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109 (4th Cir. 1989), *cert. denied*, 491 U.S. 904, 109 S.Ct. 3185, 105 L.Ed.2d 693 (1989) and *Sierra Club v. Union Oil Co.*, 813 F.2d 1480 (9th Cir. 1987), *judgment vacated*, 485 U.S. 931, 108 S.Ct. 1102, 99 L.Ed.2d 164 (1988), *judgment amended and reinstated* 853 F.2d 667 (9th Cir 1988), *judgment on remand*, 716 F.Supp. 429 (N.D. Cal. 1988).

The principal issue presented in this case, whether upstream states may violate federally-approved water quality standards of downstream states, has significant implications for water resources in which the Sierra Club and its members have a compelling interest.

SUMMARY OF ARGUMENT

The Clean Water Act requires dischargers to comply with federally-approved water quality standards of affected states. 33 U.S.C. §§ 1311(b)(1)(C), 1312(a), 1313(c), 1341(a)(2), 1342(d)(2). To hold otherwise would permit states to export their water pollution without the consent of the receiving jurisdiction, unfairly shifting pollution problems, and the burden of waste treatment, to downstream states. Arkansas' "parade of horribles" is

unconvincing, and ignores Congress' scheme. Thus, the Tenth Circuit properly upheld EPA's determination that the Clean Water Act requires Arkansas to comply with Oklahoma's federally-approved water quality standards.

ARGUMENT

THE TENTH CIRCUIT CORRECTLY UPHELD EPA'S DETERMINATION THAT THE CLEAN WATER ACT REQUIRES DISCHARGERS TO COMPLY WITH ALL APPLICABLE WATER QUALITY STANDARDS.

A. Compliance With Federally-Approved Water Quality Standards Is The Paramount Objective Of The Clean Water Act.

The Clean Water Act codifies Congress' "national goal that the discharge of pollutants into navigable waters be eliminated by 1985." Section 101(a)(1),[1] 33 U.S.C. § 1251(a)(1). The purposes of this goal are "restoration and maintenance of the chemical, physical and biological integrity of the Nation's waters." *Id.* To achieve these objectives, the Act prohibits the discharge of any pollutants to navigable waters except as permitted by the Act. Section 301(a), 33 U.S.C. § 1311(a).

Congress created the National Pollutant Discharge Elimination System ("NPDES") to implement this discharge prohibition. Section 402, 33 U.S.C. § 1342. Under the NPDES program applicants for discharge permits must satisfy "all applicable requirements" under the Act,

[1] All section references are to the Clean Water Act, unless otherwise stated.

including both technology-based and water quality-based effluent limitations. 33 U.S.C. §§ 1342(a)(1), 1311(b), 1312, and 1313(b). EPA is required to establish and periodically update technology-based limits which, in ratchet-like manner, impose increasingly stringent standards as waste treatment technology improves over time. Sections 301(b) and 304(b), 33 U.S.C. §§ 1311(b) and 1314(b). Congress intended that the Act be "technology-forcing," stressing that it embodies a "mandate to press technology and economics" to achieve "increasingly tougher controls" on industrial effluent reduction. S.Rep. No. 414, *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3668, 3709; *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 123-24 (D.C. Cir. 1987).

EPA and the states share responsibility for establishing water quality-based limits. EPA develops water quality criteria designed to protect "plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics and recreation." Section 304(a), 33 U.S.C. § 1314(a). Whenever EPA determines that technology-based effluent limitations are insufficient to assure protection of public health and beneficial uses, including "the protection and propagation of a balanced population of shellfish, fish and wildlife, and . . . recreational activities in and on the water," it "shall" establish water quality-based effluent limitations for the pertinent point-sources. Section 302(a), 33 U.S.C. § 1312(a). States are directed to develop, and at least every three years to update, water quality standards consistent with criteria adopted by EPA. Section 303(a), 33 U.S.C. § 1313(a); 40 C.F.R. Part 131.

> Such standards serve the dual purposes of establishing the water quality goals for a specific water body *and serving as the regulatory basis for establishment of water quality-based treatment controls* and strategies beyond the technology-based level of treatment required by sections 301(b) and 306 of the Act.

40 C.F.R. § 130.3, emphasis added.

If state-proposed water quality standards "protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act],"[2] and are approved by EPA, they "shall thereafter be the water quality standard for the applicable waters of that State." Section 303(c)(3), 33 U.S.C. § 1313(c)(3). If EPA disapproves the state standards, it shall "promptly" propose and promulgate water quality standards for such state. Section 303(c)(4), 33 U.S.C. § 1313(c)(4).

EPA is responsible for issuing NPDES permits, but may delegate that authority to qualified states. Section 402(b), 33 U.S.C. § 1342(b). EPA issued the Fayetteville NPDES permit here in question, because at the time of its issuance, Arkansas had not yet received delegated permitting authority under Section 402(b). States may devise more stringent effluent limitations and water quality standards than the minimum requirements established in the Act and promulgated by EPA. Section 510, 33 U.S.C. § 1370; *Sierra Club v. Union Oil Co., supra,* 813 F.2d at 1487. More stringent state effluent limits, including those "required to implement any applicable water quality

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[2] EPA's regulations clarify that to "serve the purposes of the Act," water quality standards should "wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water. . . . " 40 C.F.R. § 130.3.

standard established pursuant to the [Act]," are enforced under the Act. Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

The express language Congress selected in drafting the Clean Water Act leaves no doubt of its intent that water quality standards designed to protect fish, wildlife, recreation and other beneficial uses be strictly enforceable. Section 301(b)(1)(C) directs that

> In order to carry out the objective of this chapter there shall be achieved . . . not later than July 1, 1977 any more stringent limitations, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) . . . or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1311(b)(1)(C).

Sections 402(a)(2) and 402(b)(1)(A) implement this mandate by prohibiting the issuance of any NPDES permit which does not assure compliance with Section 301:

> The [EPA] Administrator shall prescribe conditions for [EPA-issued NPDES] permits to assure compliance with the requirements of paragraph (1) of this subsection [which incorporates, inter alia, the requirements of Section 301]. . . .

33 U.S.C. § 1342(a)(2); *see also,* 33 U.S.C. § 1342(a)(3).

> The [EPA] Administrator shall approve each [proposed State NPDES permitting] program unless he determines that adequate authority does not exist: (1) To issue permits which – (A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312. . . .

33 U.S.C. § 1342(b)(1)(A).

Consistent with the foregoing, section 401 prohibits the issuance of any federal permit, including EPA-issued NPDES permits as issued to Fayetteville herein, which may affect the quality of water in a downstream state, unless the permit is conditioned "to insure compliance with applicable water quality requirements." 33 U.S.C. § 1341(a)(2). "If the imposition of conditions cannot insure such compliance such [federal agency] shall not issue such license or permit." *Id.; accord,* 40 C.F.R. § 121.2(a)(3) (state certifications under section 401 must assure that the proposed activity will not violate "applicable water quality standards") and 40 C.F.R. 124.53(e) (state certifications must assure compliance with sections 301 and 303, among others).

EPA's regulations governing the NPDES permitting process repeat the foregoing statutory commands:

> No [NPDES] permit may be issued when the imposition of conditions cannot ensure compliance with the *applicable water quality requirements of all affected states.*

40 C.F.R. § 122.4(d) (implementing Section 301(b)(1)(C) of the Act), emphasis added.

> [E]ach NPDES permit shall include conditions meeting the following requirements when applicable. . . .
>
> (d) *Water quality standards and state requirements: any requirements* in addition to or more stringent than promulgated effluent limitations, guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of [the Clean Water Act] *necessary to* . . .
>
> (4) *Conform to applicable water quality requirements* under section 401(a)(2) of [the Clean

> Water Act] *when the discharge affects a state other than the certifying state.*

40 C.F.R. § 122.44(d)(4) (implementing Section 401(a)(2) of the Act), emphasis added.

EPA's regulations governing state adoption of water quality standards are in accord as well:

> In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters *and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.*

40 C.F.R. § 131.10(b).

EPA's regulations likewise require that state certifications under Section 401 must assure that the proposed activity will not violate "applicable water quality standards." 40 C.F.R. § 121.2(a)(3).

The Tenth Circuit properly gave effect to this settled statutory and regulatory scheme. Courts should accord substantial deference to the consistent interpretation of a statute by the agency entrusted with its administration. *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44, 70 L.Ed.2d 23 (1981); *E.I. DuPont De Nemours & Co. v. Train*, 430 U.S. 112, 135 n.25, 97 S.Ct. 965, 978 n.25, 51 L.Ed.2d 204 (1977) (EPA interpretation of Clean Water Act entitled to great weight, particularly in view of technical nature of statute and agency's expertise); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Even assuming *arguendo* that Congress' intent to require upstream states to comply with federally-approved downstream water

quality standards is not clearly expressed, EPA's authoritative and consistent interpretation of the Act to so require is entitled to substantial deference. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed. 694 (1984).

The Tenth Circuit's construction of the Act and its regulations, moreover, is fully consistent with the Act's legislative history. Congress noted that EPA

> is under a *specific obligation* to require that level of effluent control which is needed *to implement existing water quality standards without regard to the limits of practicality.*

S.Rep. No. 414, *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3668, 3710, emphasis added. Even though in 1977 Congress relaxed the best available technology effluent limitations in certain circumstances, it declined to suffer any relaxation of water quality-based standards,[3] explaining:

> pressure must be maintained to assure improved water quality and to avoid slipping back.

S.Rep. No. 370, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 4326, 4367.

Section 505(h) likewise reflects Congress' intent that downstream states be empowered to enforce their water quality standards against upstream polluters. 33 U.S.C.

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[3] The 1977 amendments allowed the substitution of "best practicable technology" for "best available technology" in respect to the discharge of certain pollutants provided "such modification will not interfere with the attainment or maintenance" of high levels of water quality. 33 U.S.C. § 1311(g).

§ 1365(h). This provision authorizes the governor of a state to sue EPA to enforce an "effluent standard or limitation under this chapter" whose violation in an upstream state is "causing a violation of any water quality requirement in his state." Because subsection (f) defines "effluent limitation or standard under this chapter" to include certifications under section 401 and NPDES permits under section 402, downstream states such as Oklahoma are plainly entitled to enforce their water quality standards against EPA discharge permits issued in upstream states such as Arkansas.

The Act's unambiguous mandate that dischargers comply with "any" applicable water quality standard established pursuant to the Act, as expressed in sections 301(b)(1)(C), 402(a)(2) and 402(b)(1)(A), and further enforced in Section 401(a)(2), is dispositive here. No other provision of the Act, including those on which Arkansas relies, purports to relieve dischargers of this paramount duty.

Arkansas urges nonetheless that dischargers are free to violate EPA-approved water quality standards in downstream states, on the grounds that section 402(b)(5) of the Act requires source states to consider, but not necessarily to accept, downstream state *recommendations* with respect to permit applications.[4] But section 402(b)(5)

---

[4] Arkansas contends that section 402(b)(5) is applicable to EPA-issued permits on the grounds section 402(a)(3), directs that EPA-issued permits are "subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section."

does not purport to exempt upstream states from complying with downstream water quality *standards*. Indeed, it mentions neither section 301 nor section 401, nor the independent requirements they impose.[5]

---

[5] And, of course, Section 402(d)(2) mandates that "[n]o permit shall issue" if EPA objects on the grounds a permitting state failed to accept recommendations from an affected state *or the permit is "outside the guidelines and requirements of [the Act]."* 33 U.S.C. § 1342(d)(2), emphasis added. The latter prohibition subjects NPDES permits to Section 301(b)(1)(C)'s requirement that discharges comply with water quality standards.

Although it is true that Section 402(d)(3) states that [t]he [EPA] Administrator may, as to any permit application, waive paragraph (2) of this subsection [i.e., Section 402(d)(2)], as the Tenth Circuit explained Congress did not intend thereby to vest EPA with discretion to ignore violations of downstream water quality violations. *State of Oklahoma v. EPA*, 908 F.2d 595, 611 n. 19 (10th Cir. 1990). EPA, moreover, readily concedes this point:

> [N]o waiver of review [under Section 402(d)(3), (e) or (f)] may be granted for the following classes or categories: . . .
>
> (2) Discharges which may affect the waters of a state other than the one in which the discharge originates.

40 C.F.R. § 123.24(d). EPA's regulations governing its "review of and objections to State permits," moreover, specifically identify as a ground for objection, "[t]he effluent limits of permit fail to satisfy the requirements of 40 C.F.R. 122.4(d)." 40 C.F.R. § 123.44. The latter regulation, as discussed *infra*, requires all NPDES permits to

> [c]onform to the applicable water quality requirements under section 401(a)(2) of [the Clean Water

(Continued on following page)

Rather, section 402(b)(5) merely directs that source states must solicit from affected states recommendations that may pertain to any aspect of a permit application. Since such recommendations obviously can address a host of concerns and suggestions extending well beyond the affected states' adopted minimum water quality standards, it is not surprising that the source state is not obliged to accept them. Such recommendations could well suggest, for example, advanced methods of waste treatment not otherwise required under the Act which would yield water quality much higher than required by the affected state's water quality standards. The overarching goal of the Act is, after all, total *elimination* of pollutants. 33 U.S.C. § 1251(a)(1). Promoting consultations that would *enhance* water quality, rather than merely avoid its illegal degradation is fully consonant with the Act's objectives. 33 U.S.C. § 1251. The fact that section 402(b)(5) imposes an *additional, consistent* duty on source states to afford downstream states an opportunity to submit recommendations concerning proposed upstream permits in no wise relieves such permits from compliance with sections 301 and 401.

(Continued from previous page)

> Act] when the discharge affects a State other than the certifying State.

The foregoing regulatory direction is fully consistent with Congress' intent that no NPDES permit be "less stringent than required by any State effluent limitations or water quality standards." H.R. Conf.Rep. No. 830, 95th Cong., 1st Sess. 97, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 4424, 4472. *See* discussion in *State of Oklahoma v. EPA, supra,* 908 F.2d at 611.

Had Congress intended to relieve dischargers from the absolute duty to comply with *all* applicable water quality standards adopted pursuant to the Act, it could easily have expressly so provided. But section 402(b)(5) does not expressly, nor by necessary implication, do so. Under settled rules of statutory construction, absent clear language evincing a contrary intent, section 402(b)(5) should be read in harmony, rather than in direct conflict, with sections 301(b)(1)(C) and 401(a)(2) and the Act's paramount goal of water quality compliance they enforce. *Adams v. Howerton,* 673 F.2d 1036, 1040 (9th Cir. 1982), *cert. denied,* 458 U.S. 1111, 102 S.Ct. 3494, 73 L.Ed.2d 1373 (1982).

B. Arkansas' Demand That Upstream States Be Allowed To Satisfy Their Water Quality Standards By Exporting Their Wastes To Waters Of Downstream States Would Thwart The Clean Water Act.

Arkansas' petition asks this Court to declare "open season" on downstream water quality standards. As EPA conceded below, Arkansas' construction of the Act would make achieving downstream water quality standards "impossible in many circumstances or . . . possible only by imposing a disproportionate burden on dischargers located in the downstream state." *State of Oklahoma v. EPA, supra,* 908 F.2d at 606, quoting from EPA's Brief at 21.

Under Arkansas' interpretation, the water quality "floor" established by the federal minimum standards would become the "ceiling" of water quality for the nation. Arkansas' construction of the Act would punish states with more stringent water quality standards and

reward those states which ignore downstream water quality standards. Rewarding dischargers for locating in states with less stringent water quality requirements (by relieving them from complying with more stringent downstream water quality standards) would result in "pollution shopping," contrary to the Congress' intent:

> The result [of lax EPA oversight of state permit programs] might well be the creation of "pollution havens" in some of those States which have approved permit programs. *This result is exactly what the 1972 amendments were designed to avoid.*

S. Rep. No. 370, 95th Cong., 1st Sess. at 73, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 4326, 4398, emphasis added.

The decision of the Tenth Circuit does not usher in a new era of water quality improvement, but rather merely gives effect to the existing statutory and regulatory regime. It allows the steady march toward elimination of water pollution to proceed, as Congress intended. The interpretation offered by Arkansas, by contrast, is a step backward in water quality improvement, and contrary to both the letter and spirit of the Clean Water Act and its regulations.

C. Arkansas' Invocation of *Ouellette* and Other Federal Preemption Cases Is Misplaced, Since No State Common Law Claims Are Presented Here.

Arkansas contends that *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 931 L.Ed.2d 883 (1987) and *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) support its claim that federally-approved water quality standards of

a downstream state are not enforceable against upstream dischargers. Its reliance is misplaced. As the Tenth Circuit correctly observed, both of these cases involved a claim by a downstream state plaintiff against an upstream state discharger *under state common law*. These cases correctly held that in the context of inter-state water quality disputes, the Clean Water Act preempted state common law. In contrast, the Tenth Circuit properly concluded

> the case before us poses the question of the applicability of the *federally* approved water quality standards of an affected downstream state in permitting a discharge in an upstream state.

State of Oklahoma v. EPA, supra, 908 F.2d at 607. The Tenth Circuit accurately observed that *Ouellette*'s discussion of sections 401 and 402 was *dicta*. *Id.* at 608. Consistent with *Ouellette* and *Illinois*, federal law controls the allocation of water quality among the states. *Champion International Corporation v. EPA*, 652 F.Supp. 1398, 1399-1400 (W.D. N.C. 1986), *vacated for lack of subject matter jurisdiction and remanded*, 850 F.2d 182, 186-87 (4th Cir. 1988) (noting that EPA properly objected to North Carolina permit on grounds it threatened to violate downstream Tennessee water quality standards). And, as part I.A. of this brief explains, the Clean Water Act and its regulations require compliance by all dischargers with "any" applicable water quality standards adopted pursuant to the Act. Since Oklahoma's water quality standards were approved by EPA and apply to the segment of the Illinois River affected by the Fayetteville discharge, that discharge must comply with those standards.

D. Arkansas' "Parade of Horribles" Lacks Practical Merit and Improperly Asks this Court to Invade the Legislative Arena and Upset the Balance Already Struck by Congress.

Arkansas asserts the Tenth Circuit's ruling usurps source state prerogatives and will lead to "chaotic" conflicts between downstream and upstream states. Neither claim has merit. Under the Act no state has discretion to issue NPDES permits which violate federally-approved water quality standards. 33 U.S.C. § 1311(b)(1)(C). The Tenth Circuit's carefully reasoned decision merely enforces *Congress'* judgment that "there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to [the Act]."

Arkansas' fear of "chaos" is likewise unfounded. EPA has ample authority under section 303 to assure that the state water quality standards it must review at least every three years are not in conflict and reflect the comprehensive water quality planning efforts states must conduct under sections 208 and 305. 33 U.S.C. § 1288, 1313 and 1315; 40 C.F.R. Parts 130 and 131. The surest means of avoiding and reconciling potential interstate conflicts is by implementing, rather than sabotaging, the water quality management and planning functions the Act mandates. Uniform enforcement of water quality standards will provide needed certainty for dischargers and the public alike. Compliance with federally-approved standards will avoid, not create, chaos. Arkansas' proposal that upstream states be given discretion to violate federal standards would have the opposite effect.

Finally, and most importantly, comparison of the potential conflicts which might flow from the respective positions of Arkansas and Oklahoma confirms the wisdom of the Tenth Circuit's ruling. If Oklahoma's position is sustained, some upstream dischargers may have to tighten their discharge limits, but *no* water quality standards of any state will be violated, and the fish, wildlife, recreation and other protected uses under the Act will be enhanced. If Arkansas' position is sustained, by contrast, although some upstream dischargers will save money, downstream states' water quality standards *will* be violated, and the beneficial uses dependent thereon *will* be harmed. Sierra Club submits that the former result is much more consonant with the purposes of the Clean Water Act than is the latter. Therefore this Court should affirm the Tenth Circuit's construction of the Act.

CONCLUSION

The judgment of the Tenth Circuit Court of Appeals holding that upstream state dischargers must comply with federally-approved water quality standards of downstream states should be affirmed.

Date: July 19, 1991

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

(23) (22)

Nos. 90-1262, 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ARKANSAS, *et al.*,
Petitioners

v.

STATE OF OKLAHOMA, *et al.*,
Respondents

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

v.

STATE OF OKLAHOMA, *et al.*,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF MIKE SYNAR, MEMBER OF CONGRESS, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF MIKE SYNAR, MEMBER OF CONGRESS, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Representative Mike Synar submits this brief in support of respondents and urges this Court to uphold the decision by the U.S. Court of Appeals for the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990).[1]

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[1] The petitioners and respondents have consented to the filing of this brief. The letters granting consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The *amicus* Member of Congress, Mike Synar, has a substantial interest in the outcome of this case before the Supreme Court. The interest is as an individual member of Congress since 1979; as the Chairman of the Government Operations Subcommittee on Environment, Energy and Natural Resources (Subcommittee); and, as a member of the Energy and Commerce Committee. While Chairman of the Subcommittee for over eight years, the Subcommittee has conducted oversight hearings on the Environmental Protection Agency (EPA), an agency within the jurisdictional responsibilities of the Subcommittee. The Subcommittee also has held hearings related to the implementation and enforcement of the Clean Water Act. A reversal of the Court of Appeals decision would frustrate the intent of Congress in adopting the Clean Water Act and impact the ability of the oversight committees to evaluate the actions of the appropriate agency.

The arguments put forth in this amicus brief reflect the legal analyses and opinion of the individual Member of Congress and are not intended to represent a statement of position on behalf of the institution of the House of Representatives, the Government Operations Committee, the Subcommittee, or, the Energy and Commerce Committee.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Tenth Circuit is not inconsistent with the intent and purposes of the Clean Water Act. 33 U.S.C. 1251 *et seq.* In fact, the decision embraces the intent of Congress in adopting the Clean Water Act. The EPA must enforce and implement the Clean Water Act in such a manner to ensure that downstream standards are met. If this portion of the decision is not upheld, the intent of the Clean Water Act will be subverted and the goal of achieving clean

water in all communities will be more difficult, if not impossible, to accomplish. Reversal of the decision would allow upstream States to implement weaker standards of water quality, particularly if the discharge or pollution primarily will affect the waters of a downstream State thus preventing downstream States from ever achieving their own water quality standards.

The ability of Congress to provide oversight in these matters depends on the EPA's adherence to the legislative language of the implementing legislation, the adopted regulations pursuant to the legislation, and its performance of its responsibilities according to standards known to the persons affected by its actions. The decision of the EPA to modify the approved water quality standards adopted by the State of Oklahoma in order to approve the discharge permit for the Fayetteville sewage treatment plant contradicts the intent of the Clean Water Act and the objective standards by which the EPA must be evaluated.

ARGUMENT

I. ACCOMPLISHING THE GOALS OF THE CLEAN WATER ACT REQUIRES ADHERENCE TO FEDERALLY APPROVED DOWNSTREAM WATER QUALITY STANDARDS.

In adopting the Clean Water Act, Congress provided a clear declaration of goals and policy. As an element of those goals Congress expressed a desire to encourage a State-Federal partnership in order to restore the quality of the nation's waters.[2] The balancing of interests between States in order to accomplish a national goal in-

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[2] Section 101(b), 33 U.S.C. sec. 1251(b) states in part that: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."

evitably creates a conflict. Resolution of the conflict between States must be in accordance with the expressed legislative intent to reduce and eliminate water pollution.

The statutory scheme devised to accomplish this goal is one that recognizes that the EPA must approve water quality standards of individual States and must determine if particular permits violate those standards. Section 401, 402, 33 U.S.C. secs. 1341, 1342. All States are on notice of approved water quality standards for other States. Pursuant to 40 C.F.R. sec. 131.21(d), the EPA is required to publish, at least annually, a notice of approvals of State water quality standards.

This Court has held that an individual State can not impose its standards on another State through the operation of either State or Federal common law. *International Paper Co. v. Ouellette*, 479 U.S. 481, 490-491 (1987). This holding in *International Paper*, however, does not preclude the decision by the Court of Appeals below that the EPA apply downstream State water quality standards once these are reviewed and approved by the EPA.

Congress did not intend that States affected by effluent discharges permitted by a neighboring State were to be denied influence in the regulation of standards. The Clean Water Act clearly permits the objection of a State to the approval of a permit. Section 401(a)(2), 33 U.S.C. sec. 1341(a)(2). If Congress had intended to exclude consideration of downstream water quality standards, no such procedure for permitting the affected State to raise an objection to a permit, as violating its water quality standards, would have been included in the provisions of the Clean Water Act.

II. THE ACTIONS OF THE EPA MUST BE PREMISED ON OBJECTIVE STANDARDS TO PROVIDE A FRAMEWORK FOR EVALUATION AND ACCOUNTABILITY.

Pursuant to Rule X, clause 1(j) and clause 2(b)(1) and (2) of the Rules of the House of Representatives, the Government Operations Committee has the authority to review all government functions and to evaluate the "application, administration, execution, and effectiveness" of all laws within its jurisdiction.[3] Pursuant to these rules and the Rules of the Committee on Government Operations, the Subcommittee has reviewed and continues to review the operations and actions of the EPA and the implementation and effectiveness of the Clean Water Act. As part of that review, the General Accounting Office (GAO) has submitted reports evaluating the EPA's administration of the Clean Water Act and other environmental statutes.

Standards and specific goals are set by the Clean Water Act in order to have a measurement of performance. The measure of effectiveness depends not only on evaluating EPA's enforcement but also the ability of the entities to meet the standards set by the statute. Once the "rules" are determined, affected parties are on notice and thus

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[3] Rule X, clause 1(j) states in part: "In addition to its legislative jurisdiction under the preceding provisions of this paragraph (and its oversight functions under clause 2(b)(1) and (2)), the committee shall have the function of performing the activities and conducting the studies which are provided for in clause 4(c)." Rule X, clause 2(b)(1) states in part: "Each standing committee . . . shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws or parts of laws . . . in order to determine wheher such laws and the programs thereunder are being implemented and carried out in accordance with the intent of Congress and whether such programs should be continued, curtailed, or eliminated." Rule X, clause 2(b)(2) states: "The Committee on Government Operations shall review and study, on a continuing basis, the operation of government activities at all levels with a view to determining their economy and efficiency."

protection is provided to all parties. The appropriate Committee and subcommittee can then exercise its responsibility to conduct oversight in an appropriate and objective manner.

The Clean Water Act requires that States adopt water quality standards to accomplish the goals of the Act. Section 303, 33 U.S.C. sec. 1313. The State of Oklahoma adopted such water quality standards which were initially approved by the EPA in 1982. The statute requires a three year review, at which time in 1985 the standards were again approved by the EPA. In this matter, the "rules" were established upon the approval of the State of Oklahoma's water quality standards.

The discretionary authority of the EPA to modify the water quality standards of a State exists at the time it is reviewing the standards for initial or subsequent approval. At that time, the EPA must review the standards and determine if all the requirements of the Clean Water Act are met. This review should consider the interests of the State, other potentially affected States and federal environmental goals. The EPA could have anticipated potential conflicts with other States arising from the State of Oklahoma's adopted water quality standards prior to approval of the standards and required changes. There is no question that the Administrator of EPA under section 303(c)(3), 33 U.S.C. sec. 1313(c)(3) can reject the standards if "not consistent with the applicable requirements" of the chapter. There is a process for notification; for requiring changes; and, a process for the Administrator to adopt a new or revised water quality standard under section 303(c)(4), 33 U.S.C. sec. 1313(c)(4) if the State does not make such required changes.

The EPA could have required pre-approval modifications to the State of Oklahoma's water quality standards to accommodate the change it now wishes to make in order to uphold its approval of a permit allowing discharge. The change contradicts the approved Oklahoma

standard for the upper Illinois River which states that: "No degradation shall be allowed . . ." in high quality waters.[4]

Section 303(c)(3) of the Clean Water Act, 33 U.S.C. sec. 1313(c)(3) states that if the submission of a State meets applicable standards of the Act, ". . . such standard shall thereafter be the water quality standard for the applicable waters of that State." The section does not declare that the standards apply only to the State submitting the standards, but to the "*applicable waters*" of that State.

The EPA has the authority to consider whether the issuance of a permit is in compliance with applicable water quality standards. Section 401(a)(2), 33 U.S.C. sec. 1341(a)(2). When the EPA issues the permit, it is responsible for evaluating the permit in the same manner. Section 402(a), 33 U.S.C. sec. 1342(a). Thus, subsequent applications for permits which involved actions that affected the State of Oklahoma waters should have been reviewed in light of the previously approved water quality standards. The decision did not warrant the use of discretionary authority by the EPA since it had already accepted and approved a standard that did not leave room for discretion.

The conclusion of the EPA, that its discretionary authority permits it to reevaluate approved water quality standards in issuing a permit, goes beyond the statutory grant of discretionary authority. The principle of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) is that Congressional intent had to be ambiguous before the courts would defer to the discretionary policymaking of the implementing agency. In this matter the statute is clear as to when and how state standards are approved

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[4] 1982 Oklahoma Water Quality Standards and 1985 Oklahoma Water Quality Standards can be found in the Joint Appendix at pages 22 and 64 respectively. The cited section is at pages 28 and 64.

and how and when the EPA has the authority to revise or modify the standards.

Changing the rules by modifying standards after approval defeats the purpose of maintaining consistency in the application of approved standards and in the goal of providing notice to all affected parties. Congress has had concerns with the manner in which the EPA administers these programs. In evaluating the EPA's role in achieving national environmental goals, the GAO issued one report which alerted Congress to the potential for inconsistencies in enforcing environmental statutes. The GAO noted in a general management review evaluating the EPA that:

> Achieving the EPA's goal of managing for measurable environmental results is dependent on identifying and developing measures of environmental quality. A well-chosen set of measures would allow policymakers and the public to assess the general health of the environment and changes in its conditions . . . Without measures to serve as a decisional basis, EPA and Congress are faced with subjective reasoning as their sole method of assessing the effectiveness of environmental programs.[5]

The report explored in detail the problems existing between the EPA and States in the delegation of authority, monitoring and lack of defined roles and expectations on the part of the EPA. These concerns have not abated and are presently the subject of an ongoing review.

The EPA should be required to operate within the dictates of the Clean Water Act. Unless the EPA is held to the standards it has approved, oversight of the EPA policies, standards and effectiveness of national environmental goals will be even more difficult for Congress.

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[5] *ENVIRONMENTAL PROTECTION AGENCY, Protecting Human Health and the Environment Through Improved Management,* GAO/RCED-88-101, at 82 (August 1988).

CONCLUSION

The judgment of the Court of Appeals for the Tenth Circuit should be upheld in all respects.

Respectfully submitted,

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Date: July 22, 1991

Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

(23) (24)

No. 90-1266, 90-1262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

V.

STATE OF OKLAHOMA, *et al.*,
Respondent.

STATE OF ARKANSAS, *et al.*,
Petitioners,

V.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF SCENIC RIVERS ASSOCIATION OF OKLAHOMA, CITY OF TAHLEQUAH OKLAHOMA, LAKE TENKILLER ASSOCIATION, TENKILLER AREA COMMUNITY ORGANIZATION, CITIZENS' ACTION FOR A SAFE ENVIRONMENT, SAVE THE LOWER ILLINOIS RIVER, AND CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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ECOLAW INSTITUTE respectfully moves for leave to submit this brief on behalf of amici Scenic Rivers Association of Oklahoma, City of Tahlequah Oklahoma, Lake Tenkiller Association, Tenkiller Area Community Organization, Citizens' Action for a Safe Environment, Save The Lower Illinois River, and Calcasieu League For Environmental Action Now in support of the Respondents. Attorneys for Petitioner E.P.A. and for Respondent have consented to the filing of such Brief, and Attorney for Petitioner Arkansas has not responded. We urge this Court to affirm the decision by the United States Court of Appeals for the Tenth Circuit in Oklahoma v. E.P.A, 908 F.2d 595 (10th Cir. 1990).[1]

INTEREST OF THE AMICI CURIAE

Amicus Scenic Rivers Association of Oklahoma is a nonprofit organization promoting the recreational enjoyment of Oklahoma and national scenic waterways. Its members engage in primary body contact recreational use of the Oklahoma-designated Scenic Illinois River. Its members study biotic associations in high-quality waters. Just commercial canoeing on the Illinois River has declined by 32% since 1984, from 67,204 in 1984 down to 46,000 in 1990, and Amicus is vitally affected by the quality of water in the Illinois. Among other activities, Amicus cosponsors a Campfire Lecture Series at an amphitheater on one of several State campgrounds on the Illinois, featuring such topics as the Endangered Species populations which are habitat-dependent on the quality of water in the Illinois.

Amicus City of Tahlequah, Oklahoma is a city of approximately 10,000 persons. Tourism represents a major portion of the economic base for the area and the Illinois River and Lake Tenkiller attract a substantial part of the

tourist trade. About 550 jobs in Cherokee County are directly attributable to tourism and the visitor industry, generating about 38 million per annum in Cherokee County. Tahlequah is the only Oklahoma city discharging into the Illinois River above Lake Tenkiller. Its utilities trust is presently completing a state of the art estimated 7.5 million dollar sewage treatment facility and peakflow storage basins. Tahlequah gets its municipal water supply from the Illinois River, downstream from the objectionable discharge. If the Tenth Circuit decision is disturbed, then Tahlequah's water supply will contain a higher level of sewage effluent constitutents than presently contributed by the *vested* Arkansas National Pollution Discharge Elimination System (NPDES) permit holding cities.

Amicus Lake Tenkiller Association members are frequent or occasional recreational users of the Illinois River for floating, rafting, enjoying wildlife, and relaxing at the many resorts along the Scenic-designated portion of the Illinois River. Its members primarily reside within a 90-minute drive of the Illinois. The Illinois River, and the downstream affected Lake Tenkiller are the prime immediate recreational resources for the Tulsa Oklahoma area, and its members are suffering loss of recreational opportunities by reason of the interim discharge of Fayetteville effluent, both as per the overturned permit and the violations thereof. Its members would suffer economic and aesthetic harm if the Court were to reverse the decision favorable to Lake Tenkiller.

Amicus Tenkiller Area Community Organization is an incorporation of individuals in the Lake Tenkiller geographical area, providing quasi-governmental services such as fundraising for community fire and water entities, and other amenities supplanting industrial development in support of the economic base in the Lake Tenkiller geographical area. TACO is comprised of community

volunteers. An adverse decision would indirectly open the Lake community to other types of water-polluting industry and diminish tourism revenues directly.

Amicus Citizens' Action for a Safe Environment is a Not for Profit Oklahoma corporation. Its members from Oklahoma, Arkansas, and other states, enjoy the pristine beauty and recreational and therapeutic qualities which are afforded select waters by the Oklahoma Nondegradation Water Quality Standard. If this discharge into the Illinois is permitted, CASE members' health would be adversely affected by Fayetteville's effluent, which is, in solution, a liquid waste, a pollutant.

Amicus Save the Lower Illinois River is an Oklahoma Not for Profit corporation. Its members include businesses and individuals in the lower reach of the Illinois below Lake Tenkiller Ferry, and which also derive economic livelihood from the lake area. Its members would suffer economic harm if the decision below is not upheld, because area tourism is directly dependent upon the quality of Lake Tenkiller's water, which is fed by the Illinois River. If the 10th Circuit decision were set aside, recently-documented preliminary eutrophication in Lake Tenkiller would accelerate.

Amicus Calcasieu League for Environmental Action Now is a not for profit Louisiana organization representing 500 individual members who share a common concern for the sustension of functional ecosystems and preservation of clean water for human and nonhuman consumption. A reversal would negatively impact downstream states' ability to foster and promote wildlife for enjoyment by CLEAN's members.

SUMMARY OF ARGUMENT

The Tenth Circuit properly ruled that E.P.A. abused

its discretion in granting the Fayetteville permit. The views of Petitioners cannot be adopted without violating the congressional goals and policies of the Clean Water Act. Applying dounstream states standards to upstream state sources meets the goals and statutory language of the Clean Water Act. Once a state water quality standard is approved, E.P.A. may not redefine the state's goals. Reversal of the Tenth Circuit Decision would lead to continued degradation of the Illinois River and Lake Tenkiller. The Illinois is a candidate for inclusion in the National Wild and Scenic Rivers Program, and is already an Oklahoma-designated Scenic River. The City of Fayetteville should continue its historical discharge of all effluent into the White River. The Supreme Court should not disturb the decision of the Court of Appeals.

ARGUMENT

I. UPHOLDING THE TENTH CIRCUIT IS THE ONLY DECISION WHICH CAN BE RENDERED CONSISTENT WITH THE CONGRESSIONAL GOALS & POLICIES OF THE CLEAN WATER ACT. A CONTRARY DECISION WOULD ERODE THE MEANING AND INTENT OF THE CLEAN WATER ACT.

This Court must rule consistent with the goals and policies of the Clean Water Act, which is to restore and maintain the chemical, physical and biological integrity of the Nation's waters.[1] A decision compromising this goal cannot be rendered within the NPDES permit system. Congress recognizes the primary responsibilities of the

[1] 33 USC 1251.

states to prevent, reduce and eliminate pollution.[2] The Act does not authorize states or the EPA to create, increase nor perpetuate interstate pollution.

The regulatory framework of the permit issuance process clarifies the Court's appropriate role below: The Court may review additional material to explain the basis of the agency's action and the factors the agency considered.[3]

The Clean Water Act provides a two-phase involvement of downstream states: certification and licensing. The decision in Ouellette, which forms the foundation of the City of Fayetteville's appeal, is not determinative in this case, because it dealt with 33 U.S.C. 1342 licensing, not 33 U.S.C.1341(a)(2) certification. Both Oklahoma and E.P.A. agree that if imposing conditions cannot insure compliance with downstream state standards, the administering agency (in this instance E.P.A.) shall not issue such license or permit.[4]

As a prerequisite to certification for permit

[2] 33 USC 1251(b).

[3] Churchwell v. Robertson, 748 F.Supp. 768 (D.Idaho 1990) citing Friends of the Earth v. Hintz, 800 F.2d [822] at 829 [(9th Cir. 19860]; Asarco, Inc. v. EPA, 616 F.2d 1153, 1159-60 (9th Cir. 1980). Moreover, the Court may consider, particularly in highly technical areas, substantive evidence going to the merits of the agency's action where such evidence is necessary as background to determine the sufficiency of the agency's consideration. Asarco, id.

[4] International Paper Co. v. Ouelette, 479 U.S. 481 (1986). The Court in Ouellette was silent as to certification, addressing instead the second of the two-phase process of permit authorization, and the discretionary level. Distinguish 33 USC 1341(a)(2) is not the discretionary phase-- achieving consent of the downstream state at 33 USC 1341(a)(2) is mandatory. See also, E.P.A. Brief, Footnote 22, page 18.

issuance, Fayetteville was to provide the EPA Administrator with certification that its discharge would comply with, *inter alia,* the water quality-related effluent limitation standards, water quality standards and implementation standards of the Clean Water Act.[5] Oklahoma had in place a New Point Source ban and policy opposing all degradation of the Oklahoma-designated Scenic Illinois River, beginning just 39 miles below the municipality's Split Flow Facility.

The Tenth Circuit set aside the EPA's determination that imposing conditions could assure compliance with Oklahoma Water Quality Standards as measured at the state border. EPA's decision *was* unsupported by substantial evidence.[6] EPA ruled that the permit as granted, would not degrade the Illinois because effluents were reduced to undetectable limits. The Tenth Circuit noted, as all parties agree, that 25% of the unacceptable bioavailable nutrients would enter the Scenic-designated portion of the Illinois River. Clearly, the undetectable standard, if *necessary* in light of the statute's plain language, was violated and the Tenth Circuit properly so ruled.[7]

A second aspect of this was that detectability is measured in light of "current condition" of the Illinois River. EPA seems to espouse that nothing in the nondegradation policy states when the Illinois should not

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[5] 33 USC 1341(a).

[6] Quivira Mining Company v. U.S. Environmental Protection Agency, 765 F.2d 126, (10th Cir. 1985).

[7] Oklahoma in its Brief before E.P.A. defined degradation as any detectable increase in wastes. Distinguish, there is a 6.1 million gallon per day detectable increase in wastes, offset only by such evaporation as may occur prior to reaching the scenic-designated portion.

be degraded. Since EPA has not forced other Arkansas cities to tool-up to appropriate technology, this effluent will blend with existing Arkansas effluent. Comparing this facility's effluent with that of Arkansas's other five cities dumping into the Illinois, EPA apparently concluded that Fayetteville doesn't look so bad. Just because there are existing permits on the Illinois which affect the water more adversely due to use of outmoded technology, does not justify violating the ban on new sources.

A. APPLYING DOWNSTREAM STATE STANDARDS TO UPSTREAM STATE SOURCES MEETS THE GOALS AND STATUTORY LANGUAGE OF THE CLEAN WATER ACT.

Both Oklahoma and EPA agree that EPA correctly mandatorily applied the Oklahoma Water Quality Standards for the Illinois River at the state line.[8] The question is whether EPA must defer interpretation to the Administrator of an EPA-approved State Implementation Plan. If not, must EPA interpret Oklahoma Water Quality Standards according to the plain meaning of the regulations?[9] And if not, may EPA interpret the

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[8] 33 U.S.C. 1341(a)(2) states, in relevant part: [The permitting agency] based upon the recommendations of such State, the Administrator; and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit. (*emphasis added.*)

[9] It did not. "Undetectable" degradation is not equivalent to "nondegradation." The former is a function of technological limit on analysis, based upon dilution (which is not a Beneficial Use). The latter is a measure of river ecosystem functionality, which distinguishes

Oklahoma Water Quality Standard such that the result violates the language and intent of the Oklahoma Nondegradation Policy and the Clean Water Act?[10] If any of these queries cannot be answered affirmatively, then the Appellee must prevail.

The EPA in its Brief at page 6 omits the most crucial language of the Clean Water Act applicable to this proceeding. True, the EPA may condition such permit ...as...necessary to insure compliance with applicable water quality requirements. But [if] the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.[11]

Downstream states have a voice in upstream activities affecting their water quality within the ambit of the Clean Water Act. In United States v. Marathon Development Corp., 867 F.2d 96, 99-100 (1st Cir. 1990), the Court stated:

> The ability of states to enforce their own more stringent water quality standards by denying certification for a ... permit is consistent with the legislative purpose and history of the Clean Water Act. Congress declared its policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.' 33 U.S.C. Sec. 1251(b).[12]

return water quality from ambient water quality, comparing the quality of each independently.

[10] It may not. The "undetectable" standard was not met, as evidenced by the admission that 25% of bioavailable nutrients from the facility would cross into the Scenic-designated portion of the river.

[11] 33 USC 1341(a)(2).

B. ONCE A STATE WATER QUALITY STANDARD IS APPROVED BY EPA, EPA MAY NOT REDEFINE THE STATE'S GOALS.

Arkansas did not have an National Pollution Elimination System permit program in place when the Fayetteville permit was sought, thus the Fayetteville permit application was administered thru EPA. The structure of State-State conflict resolution is inapplicable where EPA exercises this default jurisdiction, because EPA administers the program where there is no state program in place. Under the EPA default jurisdiction provisions, EPA does not enjoy an arbiter's veto power under the Clean Water Act. Rather, Oklahoma (as an affected state) is afforded the historical judicial review process which has existed since 1948.

The Administrator is required by 33 USC 1251 et seq. to include more stringent state limitations necessary to meet state water quality standards, and lacks authority to set aside or modify those limitations in permit proceedings.[13]

[12] "The legislative history of section 401 of the Act ("Certification") confirms that Congress intended to give states [a voice] over the grant of federal permit authority for activities potentially affecting a state's water quality." Id., 867 F.2d 101. Additionally, the Court held that allowing states to impose, in the context of a federal law, their own more stringent environmental standards is not unique and has never been held to be irrational or unconstitutional.

[13] In Re Bethlehem Steel Corporation, (GCO #58, March 29, 1977).

The state of Oklahoma on three occasions submitted its nondegradation policy and beneficial use criteria for EPA interpretation, modification or rejection. In 1982, in 1985 and in 1988, EPA accepted the Oklahoma Standard without interpretation or modification.[14] By doing so, the Oklahoma Water Quality Standard

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[14] EPA is free to approve or disapprove state water quality standards without judicial review. Westvaco Corp. v. US E.P.A, 899 F.2d 1383 (4th Cir. 1990). But once standards have been implemented by the State, EPA no longer has interpretive capability. 33 USC 1313 *distinguishes* interstate from intrastate Water Quality Standards, and provides in relevant part:

> The...State water pollution control agency of such state shall from time to time (but at least once each three year period ...) hold public hearings for the purpose of reviewing applicable water quality standards and as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.
>
> (c)(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes, and also taking into consideration their use and value for navigation.

supplanted federal interpretation.[15] EPA's role at 33 USC 1341(a)(2) becomes one of identifying the entities which may be affected, affording a hearing, accepting evidence, and conditioning the license as necessary to comply with achievement of all applicable water quality requirements.[16] If an affected state determines that discharges from a certain category of activity will not meet state water quality requirements, the federal government is prohibited from authorizing the activity by issuance of a federal permit.[17] To interpret 33 USC 1341 as affording States sovereignty in certification but not in interpretation of their standards is inconsistent and unsupported by the language and caselaw at 33 USC 1341. States in both roles will usually be affected states, and states in both roles must interpret applicable state (not federal) statutes and regulations. The EPA's role was exercised in the review process, whereby triennially it recommends interpretation or modification or may even reject water quality standards.[18] Upon approval, EPA's window of interpretive opportunity closed.

State water quality criterion substitute for the

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[15] 33 U.S.C. 1342(b); 33 U.S.C. 1370.

[16] In Re Indianapolis Power & Light Co. (1975) U.S. E.P.A. NPDES Permit Op. No. 14; Re United States Steel Corp. (1975) U.S. E.P.A. NPDES Permit Op No. 17, the EPA was held to have an obligation to include conditions more stringent than the EPA minimums where required by the terms of state certification provided pursuant to 33 U.S.C. 1341.

[17] United States v. Marathon Development Corporation (1989, CA1 Mass) 867 F.2d 96.

[18] Oklahoma's nondegradation policy was never challenged by EPA in the appropriate triennial review setting.

Federal equivalent once the standards are approved by the Secretary.[19]

EPA's supplantation of Oklahoma water quality standard violates the decision in In re Bethlehem Steel Corporation, (GCO #58, March 29, 1977).[20] In the case before this Court. EPA lowered the water quality standard for the Illinois by its interpretation. It did so without affording notice and opportunity for the affected state to exercise its prime role. This violated EPA's regulation.[21]

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[19] US v. Rivera Torres, 656 F.Supp 251 (D. Puerto Rico 1987). Torres involved a Section 404 permit.

[20] "EPA has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law. (See Decision of General Counsel, No. 44)." *Id., p. 338.* This decision recognizes that EPA has some latitude, to effectuate more stringent standards where necessary to meet the timetable of 301(b)(1)(C), where it states:

> In enacting Section 401, Congress clearly intended to give the states an opportunity to assure that federally-issued NPDES permits contained limitations necessary to implement the State's water quality standards. There is no indication in the Act, or in the legislative history, however, that Section 401 was intended to limit the authority and obligation of EPA to independently assess the need for more stringent conditions to meet the requirements of Section 301(b)(1)(C).

[21] EPA regulations provide that "in determining whether such standards are attainable for any particular segment, the [permitting agency] should take into consideration environmental, technological, social, economic, and institutional factors." 40 C.F.R. 130.17(c)(1). EPA's regulations are more specific in regard to downgrading existing water quality standards. Standards may be lowered *only* when the State can demonstrate that one of three factual situations exists:

(i) The existing designated use is not attainable because of natural background;

Here, EPA's "undetectable" standard fails to include factors to be considered and methodology to be used to judge compliance with such a standard.[22] By any definition, "detectable" is a more blurried standard than is applied by Oklahoma to its own potential Point Sources wishing to site on the Illinois. E.P.A. uses a subjective, not objective, compliance standard. It invites years of litigation over every conceivable aspect of detection.[23]

The Illinois at the Scenic boundary, still bears 25% of Fayetteville's bioavailable nutrients. Also, by Petitioners' own admission, phosphorous would not be fully assimilated by the Illinois before reaching the Oklahoma-designated Scenic reach. By determining that this remaining 25% bioavailable nutrient load is "undetectable," the Administrative Law Judge on remand ruled arbitrarily and capriciously.

(ii) The existing designated use is not attainable because of irretrievable man-induced conditions; or

(iii) Application of effluent limitations for existing sources ... would result in substantial and widespread adverse economic and social impact.

[22] Champion International Corporation v. US EPA, 652 F.Supp. 1398 (DC WD NC, 1987).

[23] Nondetectable by the Administrator, the affected state or the source state? Objectively traceable or nonspecifically attributable? Traceable but no longer a New Point Source? Ambient cumulative or viewed in isolation from waste load synergistics? Nondetectable in the static sense-- as measured only for certification? Nondetectable in the dynamic sense-- as measured once per five years? Nondetectable at every moment? Detectable by chemists? Detectable by aquatic organisms? Detectable by affect on aquatic organisms, and if so, how much causation is required?

II. REVERSAL OF THE TENTH CIRCUIT DECISION WOULD LEAD TO CONTINUED DEGRADATION OF THE WATER QUALITY OF THE ILLINOIS RIVER AND LAKE TENKILLER.

Oklahoma's NONDEGRADATION Criterion is distinct from and unrelated to the "detectable" standard applied by EPA. EPA in effect violated Oklahoma Water Quality Standard by gauging the permit on detectability, because the Oklahoma rule prohibits ALL new point sources on the Illinois. Oklahoma cities and businesses absorb the proponderance of the economic impact of its criterion.

Clearly the existence of a New Point Source has a DETECTABLE and MEASURABLE affect on the quality of Illinois River Water. One detectable modification to the ecosystem is an increased flow volume of three million gallons per day, of effluent. the EPA concedes that phosphorous would not be completely assimilated by the time it reaches the Scenic River boundary.[24] Petitioners' Brief admits that nutrients in the effluent will not be totally absorbed."[25]

A. THE ILLINOIS RIVER IS A CANDIDATE FOR INCLUSION IN THE NATIONAL WILD AND SCENIC RIVERS PROGRAM.

Under the Wild and Scenic Rivers Act, state-designated Scenic Rivers are to be afforded agency

[24] EPA Brief, page 9.

[25] Petitioners' Brief at page 6.

cooperation in their conservation.[26]

At its passage, the Illinois River was, and remains, a candidate for potential inclusion under the National Wild and Scenic Rivers Program.[27] In all planning for use of water resources, consideration shall be given by all Federal agencies involved to potential national scenic and recreational river areas.[28] Candidate rivers, such as the Illinois River, are to be afforded the cooperation of the head of any agency administering a component of the system, with appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river.[29]

B. THE ILLINOIS RIVER IS ALREADY AN OKLAHOMA-DESIGNATED SCENIC RIVER.

[26] 16 U.S.C.1276(d) requires that "[i]n all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic and recreational river areas, and all river basin and project plan reports submitted to the Congress shall consider and discuss any such potentials. The Secretary of the Interior and the Secretary of Agriculture shall make specific studies and investigations to determine which additional wild, scenic and recreational river areas within the United States shall be evaluated in planning reports by all Federal agencies as potential alternative uses of the water and related land resources involved."

[27] 16 USC 1271-1287, particularly 16 USC 1276(a)(40).

[28] 16 USC 1276(d).

[29] 16 U.S.C. 1283(c) Under the 1986 Amendments, the EPA Administrator assumed water quality responsibilities theretofore mandated to the Secretary of the Interior where candidate rivers are involved. The average hourly discharge is one quarter million gallons per hour.

Under 1982 Regulations promulgated by the Oklahoma Water Resources Board, no degradation is allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance.[30] This prohibition applies to the Illinois, an Appendix A River.[31] No degradation interfering with or injuring instream water uses is allowable.[32] In these waters, the quality can only be protected, maintained and improved for the benefit of all the citizens.[33] The coliform bacteria from the Fayetteville facility, even under ideal conditions, is an obvious injury to instream use, which for the Illinois (unlike Arkansas' White River) includes Primary Body Contact Recreation.[34] Aesthetics is a key component of scenic river appeal. Floating materials, suspended substances producing objectionable color and turbidity, noxious odors and tastes, and material that settle to form

[30] Oklahoma Water Resources Board Rules & Regulations, SECTION 3, Petitioner's App., page 28.

[31] Oklahoma Water Resources Board Rules and Regulations, Appendix A, Petitioner's App. p. 54.

[32] Oklahoma Water Resources Board Rules & Regulations, 1982, Section 3, Petitioners' App. p. 27.

[33] Id.

[34] Oklahoma Water Resources Board Rules and Regulations, Section 4.7, Petitioners' Appendix p. 42. In 1984, 67,204 float trips were taken with commercial canoe and rafting outfitters on the scenic-designated portion of the Illinois. About double that many commercial recreational visitors floated. This excludes all recreational users who did not rent canoes as a part of the river experience--fishing parties, campers, swimmers, birdwatchers, volleyball tournament-goers, canoe-racers, innertube floaters, etc.

objectionable deposits and interfere with aquatic life are prohibited.[35]

The 10th Circuit properly took into consideration the Scenic River designation for the Illinois River, measuring its 1970 designation date as the operative benchmark for determining whether nondegradation was being achieved. The Tenth Circuit held that where a proposed source would discharge effluents that would contribute to conditions currently constituting a violation of applicable water quality standards, such proposed source may not be permitted.[36] E.P.A. abused its

[35] Oklahoma Water Resources Board Rules and Regulations, Section 4.10-4.10(e). Petitioners' Appendix, page 43-45. See also, *Flint Ridge Development Corp. v. Scenic Rivers Association of Oklahoma, et al.*, 426 U.S. 776. The case below concerned impairment of the aquatic food web by siltation which inhibits the reproductive cycle of the web-spinning caddis fly on the Illinois River. The caddis fly is a key component of the food supply of small fish. When turbidity affects temperature and caddis fly eggs are clogged in silt, inadequate darter and minnow populations are sustained, and predator fish populations decline proportionally. This affects fishing. Fishing affects camping and resort use. The human economy suffers. Resort owners supplement with agriculture. Trees are cleared, resulting in an increase in ambient instream water temperature. Runoff increases. Erosion increases. Remaining high quality waters on this continent are few and far between.

The decline in viable, intact, biodiverse stream ecosystems necessitates a shift in perception. Rather than measurable ambient chemical modification, (especially in light of the nascence of scientific stream ecology and the individualistic biotic characteristics of each stream), the most functional assurance that this river remains viable and unmodified for recreational and scientific enjoyment is *a priori* elimination of New Point Sources and progressive strengthening of Effluent Limitation Standards from historical discharges.

[36] *Oklahoma v. E.P.A.*, 908 F.2d 595, 620 (10th Cir. 1990); 31 ERC (BNA) 1741.

agency discretion: Oklahoma's State Water Quality Standard was uninterpretable, once approved by EPA; Oklahoma's State Implementation Plan had been approved by EPA as to both its goal and method of achievement; The downstream state's denial of certification was entitled to unequivocal mandatory deference afforded by 33 USC 1341(a)(2). The Court properly reversed EPA's misapplication of "nondegradation" to mean "undetectable degradation."[37]

III. THE CITY OF FAYETTEVILLE SHOULD CONTINUE ITS HISTORICAL DISCHARGE OF ALL EFFLUENT INTO THE WHITE RIVER.

Petitioner admits that nutrients and phosphorus loading would impact the Scenic-designated portion of the Illinois River.[38]

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[37] Undetectability is achieved thru dilution, but still constitutes a net assimilation burden to the River. Petitioners admit to the affirmative phosphate and nutrient burden, and never deny the diminution in affirmative water quality improvement historically appropriated for beneficial use instream by recreationists and aquatic organisms alike.

[38] EPA Brief, p. 9 and Petitioner Brief, p. 6. The recent study, conducted ancillary to the EPA "reopener" clause in the permit (as yet unreleased in final form), shows that by reason of the diminished quality of water flowing into Lake Tenkiller Ferry, eutrophication is in fact occurring as far downstream as below the scenic-designated portion of the Illinois, resulting in such oxygen depletion to the lake that, if not mitigated by a fully-integrated, stringent management control strategy upgrading all existing contributors (including Point and Nonpoint Sources), Lake Tenkiller would soon be unable to support existing aquatic life. Historical data supporting this result *predates* the additional 6.1 million gallon per day load to the River

Fayetteville should use its historical receiving waters rather than moving its pipe to the headwaters of the Scenic Illinois River. The State of Arkansas had never seen fit to implement White River water quality protections, and Arkansas (until more recently) was in default in administering a state implementation plan. Additionally, Fayetteville has a vested historical priority to a National Pollution Discharge Elimination System Permit on the White River.

The question of detectable impact on the Illinois assumes a threshold justification: Why seek a permit outside the historical receiving waters? Even including Fayetteville's old facility, which operated under lower Effluent Limitation Standards, the White River Water Quality Standards did not restrict new sources and did not include highest quality beneficial uses.

Arkansas would lack inherent motivation to operate the facility in a manner preserving downstream values if the decision were overturned, but would have inherent motivation to operate the facility in a manner preserving downstream values if the decision were sustained. The Clean Water Act can only be as effective as the good faith of the permit holders. Oklahoma is so concerned about preserving its few legislated scenic streams that it has enunciated a policy which prohibits any new pollution permits into their waters. Because Fayetteville is largely within the White River Basin, and because The White River remains in Arkansas for its entirety, the city has a greater incentive to preserve water quality, if its discharge is into in that river.

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occasioned by the Fayetteville facility.

CONCLUSION

In light of Congress' purpose in crafting the legislation, the decision of the 10th Circuit must be sustained.

This decision does not govern where the upstream state administers the Clean Water Act. Only those eleven states which have defaulted in implementing a State plan fall outside the arbiter's power of the Environmental Protection Agency. In all other instances, the EPA retains final authority to grant or deny the permit and enjoys full agency deference in complying with approved state standards. Its decision is binding and reviewable under the "abuse of discretion" test.[39] EPA may modify or deny the license, but the clear language of the Clean Water Act is that the affected downstream state does apply its water quality requirements to discharges affecting the quality of its water, to certify or not certify the proposed activity. It applies narrowly. It binds the EPA to an objective role where functioning as both the permitting agency and the oversight authority, where the state in which the Source originates has defaulted to participate by enacting a State Implementation Plan. The policy basis of Ouellette, (prevention of overriding the permit requirements and policy choices of the Source State), is not challenged by the Tenth Circuit, since here, the Source State had no policy in place and since Ouellette addresses 33 U.S.C. 1342, not 33 U.S.C. 1341.[40]

This decision does not govern instances where the downstream state standard is less stringent than an evenhandedly-applied outright prohibition on New Point

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[39] 5 U.S.C. 706(2)(A).

[40] Id.

Sources for protection of a treasured river. Only in instances where the downstream state deems protection of a special waterway of such great importance that it is in good faith willing to permanently forego alternative economic development, would upstream sources which degrade stream quality be called into question. As stated in the Amici of Municipal Sewerage Agencies, et al., "Since a state has a strong stake in the ability of instate sources such as municipal treatment facilities to serve and support its residents, a state agency has an incentive not to set water quality standards that are impossible or economically infeasible for such sources."[41] In *U.S. Steel Corp. v. Trane*, 556 F.2d 822, 830 (7th Cir 1977) the Preemption Doctrine is placed in the context of the goal sought to be accomplished by its exercise in the first instance: "Congress thus has chosen not to preempt state regulation when the state has decided to force its industry to create new and more effective pollution-control technology." The cost externalization of which the Court was concerned in Ouellette is lacking under the facts before the Court in this instance: Oklahoma has completely foregone all municipal development on the Illinois River's Scenic stretch, for the purpose of preserving its recreational and biodiversity values.[42]

If this Court so elects, this decision can be limited to apply only as to a state-designated Scenic Stream which is a candidate for inclusion in the National Wild and Scenic Rivers program. Contrary to the chaos envisioned by Amici Metropolitan Sewerage Agencies, et al., the

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[41] Brief Amici Curiae of Municipal Sewerage Agencies, et al., page 15.

[42] Two species of endangered bats and an endangered darter are endemic to the River habitat.

Illinois River is a river which the state has elected to afford special status due to its unique, high quality recreational opportunities and quantified biological diversity. This decision does not, as argued by Amici Metropolitan Sewerage Agencies, et al., block permit renewals of *historical* dischargers on the Illinois which continue to upgrade their facilities utilizing the best available technology. At present some 11.6 million gallons per day of Arkansas effluent is being discharged into the Arkansas reach of the Illinois and its tributary streams.[43]

This decision applies only to New Sources seeking authorization to discharge which affects a designated state scenic river and National Wild and Scenic Rivers candidate, where the applicant's historical discharge point is not subject to high water quality standards, and where no compelling justification is given for protecting the Non-candidate, Non-scenic river, over an outstanding national resource waterway.

Because the Tenth Circuit properly interpreted the Clean Water Act as favoring clean water, in agreement with the *prima facie* language of the Clean Water Act and Congress' policy, and becuase this Honorable Court is also bound by the language and policy of the Clean Water Act, the decision below must be upheld.

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[43] These include Rogers, Arkansas, Prairie Grove, Arkansas, Springdale, Arkansas, Siloam Springs, Arkansas, Lincoln, Arkansas, Gentry, Arkansas, and Fayetteville, Arkansas, the latter of which is the only New Point Source. Fayetteville is the only nonhistorical discharger predating the Oklahoma Water Quality Standard. Several of these have significantly upgraded in conformance with the nonprohibitory nature of the Oklahoma nondegradation policy. One Oklahoma NPDES permit exists on the entire Upper Illinois, owned by the City of Tahlequah, a historical discharger which like Prairie Grove, Springdale, and Siloam Springs is upgrading to Best Available Technology.